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Matthew F. Bogdanos

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## Articles

### Search and Seizure: A Reasoned Approach

Matthew F. Bogdanos†

#### I. Introduction

In the last several terms, the Supreme Court has handed down no fewer than forty full opinions concerning the law of search and seizure, and has, accordingly, radically changed the face — some would say the body — of the fourth amendment. Given such judicial activity and activism, some inspection of these recent decisions and, especially, their effect on the rules of evidence is essential to their proper application in the courtroom. This is best done, not by viewing these decisions as self-contained or spontaneously conceived propositions, but by tracing the development of the fourth amendment and placing these recent interpretations in their proper historical and legal context.

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†Captain, U.S. Marine Corps. Special Assistant U.S. Attorney for the Eastern District of North Carolina, at Camp Lejeune, North Carolina. B.A., Bucknell University, 1980; M.A., Columbia University, 1983; J.D., Columbia Law School, 1983. I am indebted to Captain Scott R. Thomas, Chief Prosecutor, Marine Corps Base, Camp Lejeune, North Carolina, and Captain Kevin H. Winters, Chief Defense Counsel, Marine Corps Base, Camp Lejeune, North Carolina, for their invaluable insights and suggestions, the vast majority of which were incorporated into this article, and to Gunnery Sergeant Samuel A. Duran and Corporal Sherri M. Bailey for their administrative support. The views expressed here do not necessarily reflect the opinions or policies of the U.S. Marine Corps, the Department of the Navy, or the Department of Defense.

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The approach to search and seizure issues which I believe most suggests itself — and is adopted in this paper — is one comprising three levels of analysis. Specifically, in assessing the admissibility of a particular piece of evidence, it must first be determined whether the fourth amendment's protections have been triggered, then whether they have been violated, and finally what remedy, if any, is to follow. Within this framework, I hope to show that otherwise unintelligible opinions may be understood, formerly unpredictable decisions foreseen, and rhetorical surplusage calmly abided. Out of the morass that is the fourth amendment may very well come light.

## II. A Tripartite Analysis of Searches and Seizures

### A. *Applicability of the Fourth Amendment*

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

#### 1. *Historical Development*

The above words were included in the Bill of Rights — largely due to the tireless efforts of James Madison — primarily as a response to the use by the British of general warrants or writs of assistance. Such writs, ostensibly issued to enforce unpopular importation laws, often served as blank checks authorizing the holder to arbitrarily search through people's houses and belongings, seizing any evidence he would find. Balanced against this reaction to those abuses, however, was the realization by the Framers that the compelling interests of the enforcement of justice sometimes necessitated acting without a warrant.<sup>1</sup> As a direct result, the history and the precise phrasing of the amendment reflect both of these often-conflicting interests and, therefore, embody two independent — though usually related — concepts: 1) persons, houses,

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1. See N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* (1937).

papers, and effects shall not be unreasonably searched or seized; and 2) if a warrant is issued, then it must be based on probable cause, supported by oath, and limited by particularity of description.

For the first 150 years or so, the fourth amendment received relatively little judicial attention or development; it was generally thought that the laws of the fourth amendment were coextensive with those of trespass and private property.<sup>2</sup> Indeed, it was not until *Katz v. United States*<sup>3</sup> that the law of search and seizure really began to mushroom into such monstrous proportions as stand before us today. For it was in that case that the Supreme Court uttered those seven famous words: "the Fourth Amendment protects people, not places."<sup>4</sup> Nor could the fourth amendment be translated merely as some constitutional right to privacy, held the Court, because the fourth amendment's "protections go further, and often have nothing to do with privacy at all."<sup>5</sup>

The concomitant explosion of interest in the fourth amendment was not, however, without its casualties. The most prominent of these was a fundamental misunderstanding or misappropriation of the main thrust of the amendment's coverage, i.e., that unreasonable searches and seizures by the government are prohibited, *and* that warrants, when issued, must be legally sufficient and particular. This led to a conflation of these conceptually separate issues into one jumbled mess, culminating in the pronouncement in *Coolidge v. New Hampshire*<sup>6</sup> that all warrantless searches "are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions."<sup>7</sup>

Instead of a reasonableness clause and a warrant clause, each with its own set of criteria, the fourth amendment now em-

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2. See, e.g., *Olmstead v. United States*, 277 U.S. 438 (1928) (warrantless tapping of telephone wires was not a violation of fourth amendment because all actions took place off premises of defendant).

3. 389 U.S. 347 (1967) (Fourth amendment protects people not places. Thus, attachment of electronic listening device to public telephone booth constituted a search under the fourth amendment.).

4. *Id.* at 351.

5. *Id.* at 350.

6. 403 U.S. 443 (1971).

7. *Id.* at 454-55 (quoting *Katz*, 389 U.S. at 357 (1967)).

braced for judicial purposes a single proposition: warrantless searches are *per se* unreasonable. Thus, although the language of the fourth amendment appears to indicate that those searches and seizures conducted without a warrant be tested by one criterion (reasonableness), while those conducted pursuant to a warrant by two criteria (reasonableness and sufficiency of the warrant), the Court nonetheless allowed the reasonableness clause to be swallowed by the warrant clause. By so emphasizing the requirement of a warrant over the reasonableness of the search and seizure, the Court had, according to one critic, suddenly "stood the fourth amendment on its head" from a historical standpoint.<sup>8</sup> That the tail had finally begun to wag the dog was recognized and lamented by Justice Harlan in his concurring opinion in *Coolidge*. The law of search and seizure had become "quite intolerable."<sup>9</sup>

## 2. *Reshaping the Law after Katz*

It soon became apparent to many that it was time for the law of search and seizure to be returned to the language of the fourth amendment. The first meaningful return was made in *Rakas v. Illinois*,<sup>10</sup> where the Court held that fourth amendment coverage depends on whether the person claiming the coverage "has a legitimate expectation of privacy in the invaded place."<sup>11</sup> Quoting Justice Harlan in his *Katz* concurrence, the Court defined as "legitimate" an expectation "that society is prepared to recognize as 'reasonable,'"<sup>12</sup> and found that the passengers of an

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8. T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATIONS, 23-24 (1969).

9. 403 U.S. at 490 (Harlan, J., concurring): "[I]t is apparent that the law of search and seizure is due for an overhauling. State and federal law enforcement officers and prosecutorial authorities must find quite intolerable the present state of uncertainty . . . ." *Id.*

10. 439 U.S. 128 (1978).

11. *Id.* at 143. This is not to be confused with the concept of standing as outlined in *Rawlings v. Kentucky*, 448 U.S. 98 (1980), where the Court held that the accused, who was present in a house at the same time as a friend, had no standing to contest the search of his friend's purse in which evidence was found. Thus, not only must a "search" or "seizure" within the meaning of the fourth amendment have occurred, but the person who is raising the issue must have had a personal interest in the searched (or seized) item adequate to raise the issue.

12. *Rakas*, 439 U.S. at 144 n.12 (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring)).

automobile in which an incriminating rifle and shells were found did not have such a legitimate expectation in someone else's vehicle. Moreover, a subjective expectation of not being discovered — such as by a burglar plying his trade in an empty cabin in a secluded wood — is simply not sufficient to trigger the fourth amendment. Conspicuously absent from the Court's analysis is mention of the *per se* unreasonableness of warrantless searches.

This approach was again used the following year in *Smith v. Maryland*,<sup>13</sup> as the Court upheld the warrantless installation and use of a pen register to record numbers dialed from a suspect's home phone. In determining that the use of the pen register did not constitute a search under the fourth amendment, the Court refined the *Katz* approach to comprise two discrete questions: Whether the individual has "exhibited an actual (subjective) expectation of privacy," and whether that expectation is one "society is prepared to recognize as 'reasonable.'"<sup>14</sup> Again, no denigration of warrantless searches.

Four years later, in *United States v. Knotts*,<sup>15</sup> police officers installed a beeper in a container of chloroform which was later sold to the defendant; police then monitored the beeper to trace the container to the defendant's cabin, where they discovered a clandestine drug laboratory. The battle had begun in earnest. The Court in *Knotts* held that the defendant had the traditional expectation of privacy inside the cabin, but that the fourth amendment recognizes no such expectation as to any actions outside the cabin in the open fields. Since the beeper was used only to reveal information that was otherwise "visible to the naked eye from outside the cabin,"<sup>16</sup> there was simply no search within the meaning of the fourth amendment. Nor did it matter whether the government had trespassed on Knott's property, observed the Court, because according to *Katz* the laws of property and of search and seizure have gone their several ways.<sup>17</sup>

While the opinion on its face appeared to follow *Katz*, a

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13. 442 U.S. 735 (1979).

14. *Id.* at 740 (quoting *Katz*, 389 U.S. at 361).

15. 460 U.S. 276 (1983).

16. *Id.* at 285.

17. *Id.* (citing *Katz*, 389 U.S. 347).

closer inspection reveals what actually transpired. In *Katz*, the Court held that even though there was no trespass, there was a search within the meaning of the fourth amendment. In *Knotts*, however, the Court held that even though there *was* a trespass, there was no search — at least with respect to the area outside the cabin — within the meaning of the fourth amendment. While the sanctity of the home was still held to be inviolate, the area outside the home was increasingly becoming subject to a balancing process, one which more and more was tilting in favor of the state.

### 3. *Narrowing the Fourth Amendment's Reach: Open Fields*

This tilt became even more evident the following term in *Oliver v. United States*.<sup>18</sup> There, faced with the warrantless search by police officers of marijuana fields that were surrounded by fencing and "No Trespassing" signs, the Court wrestled with the question of where to apply this "reasonable expectation of privacy" test. It was clear the home was entitled to automatic fourth amendment coverage. Hence, no test need be applied there. It was equally clear, as Justice Holmes had pointed out in *Hester v. United States*,<sup>19</sup> that only the curtilage (which he defined as the area associated with the "sanctity of a man's home"),<sup>20</sup> and not any neighboring open fields, is entitled to fourth amendment protection. Therefore, no test need be applied there either. What was altogether far from clear, however, was where the "curtilage" ended and "open fields" began. In answering that question, the *Oliver* Court looked to the intent of the Framers.

Noting that James Madison's original draft of the fourth amendment protected people in "their persons, their houses, their papers, and their other property," but that the Framers changed "other property" to the less inclusive "effects," the Court concluded that the protections of the fourth amendment "cannot be said to encompass open fields."<sup>21</sup> No doubt, the

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18. 466 U.S. 170 (1984).

19. 265 U.S. 57 (1924) (fourth amendment protection is not afforded to open fields).

20. *Id.* at 59.

21. 466 U.S. at 176-77.

Court observed, the Framers understood the term "effects" to include personal, rather than real, property.<sup>22</sup> As such, no one — least of all the Framers — intended that the fourth amendment should shelter criminal activity simply because those with criminal intent choose to erect barriers, build fences, or post "No Trespassing" signs. On the contrary, held the Court, while the amendment reflects an overriding respect for the sanctity of the home and its immediate surrounding area, it also recognizes limits to its own coverage. The Court had no difficulty, therefore, in admitting the fruits of the warrantless search, holding that society simply was not prepared to recognize as reasonable any subjective expectation of privacy Oliver might have had in marijuana fields over one mile from his house.

Under the open fields doctrine, Oliver's marijuana fields had no fourth amendment coverage, and Oliver had no fourth amendment claim. The Court left open, however, the question of which factors are to be used in determining where such coverage ends, stressing only that the curtilage is to be distinguished from open fields.<sup>23</sup> The former was vaguely defined as the area immediately adjacent to the home that an individual reasonably may expect to remain private.<sup>24</sup>

This clear delineation between the home (and its curtilage) and all else — ringing truer to the original intent of the Founding Fathers than *Oliver's* dissenters suggested — was never more in evidence than in *United States v. Karo*.<sup>25</sup> There, agents from the Drug Enforcement Administration placed an electronic tracking device inside a can of ether which was then delivered to the defendant and subsequently monitored for over four months. The Court left no doubt as to its present understanding of the reasonableness clause of the fourth amendment: a warrantless monitoring of a beeper does not violate the fourth amendment when it reveals no information that could not have been obtained through visual surveillance.<sup>26</sup> Nor does the mere transfer to a suspect of an item containing a beeper infringe any

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22. *Id.* at 177 n.7.

23. *Id.* at 180.

24. *Id.*

25. 468 U.S. 705 (1984).

26. That the monitoring of the beeper allows for substantially better tracking than does visual surveillance is irrelevant. *United States v. Knotts*, 460 U.S. 276, 285 (1983).



privacy or possessory interest. But, once that beeper enters a private residence, a location not open to visual surveillance, and is monitored therein, all sorts of interests are infringed and sanctions triggered. Such warrantless monitoring, which in reality is nothing other than the search of a house without a warrant, "violates the Fourth Amendment rights of those who have a justifiable interest in the privacy of the residence."<sup>27</sup>

The Court's well-crafted analysis in *Karo*, through a sensible application of the second (objective) part of *Katz's* two-pronged test, appeared to yield two equally sensible propositions: areas within the home, because society posits in them a reasonable expectation of privacy, are presumed covered by the fourth amendment; while areas outside the home, because society posits in them a correspondingly lesser expectation of privacy, are presumed not so covered. Although both presumptions are rebuttable — with the latter being more easily so — they offered law-enforcement officers and magistrates an identifiable and consistent starting point in determining whether and how to conduct and evaluate searches and seizures.

However appealing such a bright-line distinction may have been, it also served to highlight the question-begging nature of *Oliver's* cloudy, if not flawed, analysis. In *Oliver*, the Court held that, because society recognizes no privacy interest in such outdoor activities as the cultivation of crops, *Oliver's* marijuana fields did not constitute curtilage, but were in fact open fields.<sup>28</sup>

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27. 468 U.S. at 714. The evidence obtained from the monitoring of the beeper inside the house was used to get a warrant, which in turn resulted in the seizure of evidence used against five defendants. Of these five, one — *Karo* himself — had no privacy interest in the house in which the beeper was monitored and, therefore, no standing to contest the admissibility of the items seized. Two others had no interest in any of the places in which the beeper was monitored prior to its arrival at the house in Taos and, because untainted evidence from the previous monitorings was presented in the warrant affidavit sufficient to establish probable cause, the warrant was nevertheless valid as to them and the fruits thereof admissible. And the last two, while having privacy interests in the prior monitorings and in the monitoring of the beeper when in the Taos residence, did not have any reasonable expectation of privacy in the monitoring of the beeper when the container was in the truck between locations. Therefore, because untainted evidence from the monitoring of the beeper when in the truck, sufficient to establish probable cause, was presented in the warrant affidavit, the fruits of the search conducted pursuant to that warrant were admissible against them as well. In short, the evidence was not suppressed with respect to any of the defendants.

28. 466 U.S. at 179.

Then the Court held — under the rubric of the open-fields doctrine — that because the area searched was an open field, it was not entitled to fourth amendment protection.<sup>29</sup> In effect, the Court begged the relevant question — whether society has an interest in protecting the privacy of open fields — by defining open fields as those areas in which society recognizes no privacy interest. But if, as *Katz* suggested, the only proper issue is whether society recognizes and is prepared to protect a reasonable expectation of privacy in the invaded place, then recourse to such circular reasoning was unnecessary (because whether the area is called curtilage or open fields is irrelevant), and the blurring of *Karo's* bright-line presumptions unjustified.

Soon after came *Dow Chemical Co. v. United States*<sup>30</sup> and *California v. Ciraolo*;<sup>31</sup> it was time to pay the piper. In *Dow*, the Environmental Protection Agency employed a commercial aerial photographer who flew over Dow's 2,000-acre manufacturing plant and, using a standard floor-mounted, aerial-mapping camera, took photographs of the facility from altitudes of 12,000, 3,000 and 1,200 feet. Initially relying on *Oliver's* distinction between open fields and curtilage, the Court was quickly forced to admit that the distinction, while instructive, was not controlling. Dow's enclosed plant complex, as well as *Oliver's* marijuana fields, fell "somewhere between 'open fields' and curtilage."<sup>32</sup> In a very real sense, the Court was admitting the irrelevance of the distinction. Ultimately, the Court simply asked whether society recognized as reasonable Dow's expectation of privacy from aerial observation of its facility. The answer was precise. The actions of the EPA did not constitute a search prohibited by the fourth amendment<sup>33</sup> because: 1) the intimate activities associated with family privacy do not extend to the uncovered, outdoor areas between buildings in a government-regulated commercial complex; 2) the aerial photographs taken were of open areas, without physical entry into the facility; and 3) the photographs, although enhancing human vision, revealed nothing that

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29. *Id.* at 180.

30. 106 S. Ct. 1819 (1986).

31. 106 S. Ct. 1809 (1986).

32. 106 S. Ct. at 1826.

33. *Id.* at 1826-27.

was not visible to the naked eye.<sup>34</sup>

If those in the Court's gallery thought the rationale underlying *Dow's* holding was limited to commercial property, they did not have long to wait to discover their error. Later the same afternoon, the Chief Justice handed down *California v. Ciraolo*,<sup>35</sup> upholding a police officer's naked-eye aerial observations from 1,000 feet of a fenced-in area immediately adjacent to the owner's house. Again, the Court cited *Oliver's* distinction between open fields and curtilage. Again, it was forced to admit the distinction was less than perfect and not dispositive. In *Ciraolo*, the area searched was a fifteen-by-twenty-five foot marijuana plot next to Ciraolo's house in his backyard surrounded by a six-foot outer fence and a ten-foot inner fence; it was undeniably within the curtilage.<sup>36</sup>

Applying the reasoning in *Oliver*, the lower court held that the warrantless aerial observation of Ciraolo's yard violated the fourth amendment.<sup>37</sup> Not so, held the Chief Justice. Although the marijuana plants were within the curtilage, that determination does not itself bar all police observation. For example, noted the Court, regardless of the measures taken by an individual to restrict observation of his activities, the fourth amendment has never been held to "preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible."<sup>38</sup> The outcome-determinative question is not whether the viewed area constituted open fields or curtilage, but whether Ciraolo's expectation of privacy from aerial, as opposed to ground-level, observation is one society is prepared to honor. Thus framed, the answer suggested itself. The aerial observations by the officers took place within public navigable airspace and in a physically nonintrusive manner. Because police traveling in the public airways are not required "to obtain a warrant in order to observe what is visible to the naked eye"<sup>39</sup> and even though the flight was not routine, but was focused on the defendant's backyard, the warrantless over-

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34. *Id.* at 1826.

35. 106 S. Ct. 1809 (1986).

36. *Id.* at 1810-11.

37. *Id.* at 1811.

38. *Id.* at 1812.

39. *Id.* at 1813.

flight and concurrent naked-eye observations were constitutionally unobjectionable.<sup>40</sup>

#### 4. *Narrowing the Fourth Amendment's Reach: Contraband*

While the Court was busily containing *Katz* by narrowing the protected curtilage and drawing a distinction of constitutional dimensions between it and open fields, it was equally busy on another front: contraband. In *United States v. Place*,<sup>41</sup> the Court upheld a warrantless canine sniff of a piece of luggage by a narcotics detection dog because of the unintrusive nature of that investigative technique and because "the sniff discloses only the presence or absence of narcotics, a contraband item."<sup>42</sup> In other words, a canine sniff — limited in both manner and information obtained — does not constitute a search for the purposes of the fourth amendment because it is contraband that is sought.

That the Court is unwilling to recognize any reasonable expectations of privacy in possessing contraband, particularly narcotics, was made abundantly clear in *United States v. Jacobsen*.<sup>43</sup> There, a Federal Express employee accidentally discovered a damaged package that contained a white powder. A Drug Enforcement Administration agent arrived, extracted samples, and ran a field drug test which revealed the substance to be cocaine. The Court approved the warrantless examination by addressing three separate issues. First, because the agent's visual examination and removal of the contents of the package did not exceed the scope of the earlier private search, it violated no expectation of privacy which had not already been frustrated.<sup>44</sup> Second, a field test, just like a dog's sniff, reveals only the presence or absence of contraband; yet "Congress has de-

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40. *Id.*

41. 462 U.S. 696 (1983).

42. *Id.* at 707. Notice that the Court could have grounded its decision, as it did in *United States v. Knotts*, on a reasonable expectation of privacy analysis, see *supra* notes 15-17 and accompanying text, by holding that *Place* had no expectation of privacy in the area intruded upon by the dog, i.e., the air surrounding the luggage. It chose, instead, a broader rationale, using the fruits of the search to bootstrap its legitimacy.

43. 466 U.S. 109 (1984).

44. *Id.* at 112.

cided — and there is no question about its power to do so — to treat the interest in ‘privately’ possessing cocaine as illegitimate.”<sup>45</sup> Therefore, no judicially cognizable privacy interest was compromised by the test. Finally, on balance, a destruction of a trace amount of the contraband for test purposes, although a seizure, was reasonable.<sup>46</sup>

#### 5. *Recent Decisions and Their New Approach to Fourth Amendment Applicability*

In light of these decisions concerning contraband, there is a valid argument that the “*per se* unreasonableness of warrantless searches” sentiment which received its greatest voice in *Coolidge* has been transformed ever so adroitly into the current view that only those warrantless searches that are of houses are *per se* unreasonable.<sup>47</sup> The Court’s recent declarations in *Hudson v. Palmer* support the proposition that all other invasions — be they searches or seizures — which take place outside the home, particularly those involving contraband, are buoyed and therefore validated by society’s overriding interest in the enforcement of justice.<sup>48</sup> In *Hudson*, the Court held that the fourth amendment does not apply to searches of a prison cell because “society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell . . . .”<sup>49</sup>

What other conclusions, if any, can be drawn from these recent decisions regarding the application of the fourth amendment? Has *Coolidge*’s “*per se* unreasonableness of warrantless searches” really been overruled? However cryptic, the answer must be yes and no. While the Court continues to hold that warrantless searches are presumptively unreasonable, it does a quick-footed end-run around *Coolidge*’s interpretation of the prohibitions of the fourth amendment by subsuming into the

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45. *Id.* at 113.

46. *Id.* at 126.

47. While searches are discussed far more frequently than seizures, the analysis brought to bear on each is the same. Any general statement as to searches, therefore, should be read to include seizure as well. See *United States v. Jacobsen*, 466 U.S. 109, 113 n.5 (1984) and cases cited therein.

48. 468 U.S. 517 (1984).

49. *Id.* at 526.

definitions of search and seizure the "reasonable expectation of privacy" and "legitimate possessory interest" tests. When the Court wants to admit the fruits of a contested activity, the Court simply holds that the activity was not a search or seizure at all and, therefore, not susceptible of fourth amendment coverage. It is small wonder the Court is often little understood by the constable on the beat.

While the result of the Court's approach is probably the same as that envisioned by the Framers, the means by which that end is achieved is arguably quite at odds with the amendment's clear language. With regard to warrantless actions, the first clause of the fourth amendment prohibits only unreasonable searches and seizures. Thus, the analysis is two-tiered: Was the activity a search or seizure? And if so, was that search or seizure unreasonable?

This is precisely the approach followed in *New Jersey v. T.L.O.*<sup>50</sup> There, faced with the warrantless search of a student's purse by a school's vice-principal, the Court first addressed the question of whether there had been a search at all. Holding that the vice-principal — as a public school official — was acting in an official governmental capacity, and that the student had a reasonable expectation of privacy in the contents of her purse, the Court concluded that a search within the meaning of the fourth amendment had occurred. The Court then addressed the question of whether the search was reasonable, noting that "although 'both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, . . . in certain limited circumstances neither is required.'"<sup>51</sup> In finding that the vice-principal, although not having probable cause, did have reasonable grounds for suspecting that the search would turn up evidence that the student had violated either the law or the rules of the school, the Court upheld the search as reasonable.<sup>52</sup>

The Court arguably could have — as in *Katz* and its progeny — simply held that no "search" had occurred because schoolchildren do not have any reasonable expectation of pri-

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50. 105 S. Ct. 733 (1985).

51. *Id.* at 743 (quoting *Almeida-Sanchez v. United States*, 413 U.S. 266, 277 (1973)).

52. *Id.* at 747.

vacy in items they bring onto school grounds. However, it specifically forsook that approach for the more historically correct and logically coherent two-tiered analysis outlined above: The questioned activity was a search, but on balance, it was reasonable. Indeed, in upholding a twenty-minute investigative stop of a vehicle as reasonable in *United States v. Sharpe*,<sup>53</sup> the Court again embraced this analysis and hinted at its broadening application by observing that the "Fourth Amendment is not, of course, a guarantee against *all* searches and seizures, but only against *unreasonable* searches and seizures."<sup>54</sup>

Most recently, a slim majority of the Court in *New York v. Class*<sup>55</sup> used this approach in upholding an officer's actions where he stopped an automobile for a traffic violation and then discovered a pistol under the driver's seat. It had come into plain view only after the officer had reached into the passenger compartment to remove some papers from the dashboard in order to observe the Vehicle Identification Number. Once again, rather than treating the officer's intrusion as a Katzian non-search based on the lack of any legitimate expectation of privacy in the passenger compartment of a vehicle, the Court specifically held that the officer's actions in reaching into the car's interior constituted a search which, on balance, was constitutionally permissible. Justice O'Connor weighed the nature and quality of the intrusion (a limited reach into an area of diminished privacy) against the importance of the governmental interests involved (the detection of stolen, uninsured, unregistered, or unsafe vehicles) and determined that the scales tipped in favor of allowing the search.<sup>56</sup>

This totality of the circumstances approach, as many of the Supreme Court's decisions of the last several terms indicate, readily lends itself to fourth amendment analysis.<sup>57</sup> Nonetheless,

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53. 105 S. Ct. 1568 (1985).

54. *Id.* at 1573 (emphasis in original).

55. 106 S. Ct. 960 (1986).

56. *Id.* at 968.

57. Consider the ease with which decisions on searches and seizures could be dispatched were the courts to adopt across the board this "plain meaning" approach to the fourth amendment. There would be no grappling with doctrines of open fields, curtilages, and the like. The first question would be a factual one: Was there a search, i.e., "an examination to find something lost or concealed," or a seizure, i.e., "a taking into custody or an exerting of control over," of "persons, houses, papers, . . . [or] effects"? If so,

when dealing with other actions such as canine sniffs, field detection tests, and beeper monitorings, rather than characterize those activities as searches or seizures which are or are not reasonable within the meaning of the fourth amendment, the Court may continue to apply the *Katz* test and thereby find these actions to be non-searches or non-seizures. While this approach may yield results less uniform than desired, it is an approach firmly embedded in the law and may be expected to continue unabated.

### B. *Satisfaction of the Fourth Amendment*

The Court's recent flurry of activity has not been limited solely to questions of fourth amendment applicability. It has also dealt with the issue of whether, once triggered, the fourth amendment and its requirements have been satisfied. This issue, in turn, subsumes two legally independent questions: Was the questioned activity conducted pursuant to a valid warrant? Or, absent a warrant, does the activity qualify under some judicially accepted exception?

#### 1. *Warranted Searches and Seizures*

The requirements of the warrant clause of the fourth amendment are clear: a warrant must be based on probable cause, supported by oath, and be of sufficient particularity. The latter two requirements are factual and are rarely the source of confusion or serious controversy, while the former — probable cause — is a child of the law and has engendered nothing but confusion and controversy.

As early as 1813, Chief Justice Marshall defined "probable cause" as "circumstances which warrant suspicion [and are] less

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then — and only then — would a legal analysis be brought to bear on whether, given the totality of the circumstances, the activity complained of was "unreasonable" within the meaning of the fourth amendment, i.e., did it violate some reasonable expectation of privacy or some legitimate possessory interest? It is at this second tier that would be grouped all those instances of warrantless searches and seizures that give such fits to law-enforcement officials and courts alike: searches incident to arrest, searches of automobiles, canine-sniffs, stop and frisks, searches of enclosed fields, the installations of monitoring devices, etc. Each and every activity, once it has been determined to be a search or seizure, would then be subject to the same balancing test to determine whether the activity had been reasonable or not.



than evidence which would justify condemnation.”<sup>58</sup> Subsequent attempts to define the term with more specificity are legion. Sounding a recurrent theme, the Court, in *Brinegar v. United States*,<sup>59</sup> noted the probable cause standard to be a “practical nontechnical conception”<sup>60</sup> which ought to be based on the “factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.”<sup>61</sup>

Eventually, and apparently dissatisfied with the disparate results being reached by different courts with differing notions of “probable cause,” the Supreme Court attempted, in *Aguilar v. Texas*<sup>62</sup> and five years later in *Spinelli v. United States*,<sup>63</sup> to lay down some more specific guidelines to be used by a magistrate in determining probable cause. The Court required that some facts bearing on the “basis of knowledge” and “reliability” of the informant be provided to the magistrate. This two-pronged test soon became a law unto itself, and each prong an inflexible, independent requirement applicable in every case in which a warrant was requested or issued. In *Illinois v. Gates*,<sup>64</sup> however, the Court announced that nothing could have been further from their initial intent. Rather, the Court had intended these two prongs to be “understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is ‘probable cause.’”<sup>65</sup> “Reliability” and “basis of knowledge” were highly relevant in deciding whether to issue a warrant, but by no means were they intended to be controlling. In their stead, the *Gates* Court reaffirmed “the totality-of-the-circumstances analysis that traditionally has guided probable cause determinations.”<sup>66</sup> In putting an end to the practice of using one analysis when determining the existence of probable cause for the issuance of a warrant and a different approach when determining the existence of probable

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58. *Locke v. United States*, 11 U.S. (7 Cranch) 339, 348 (1813), quoted in *Illinois v. Gates*, 462 U.S. 213, 235 (1983).

59. 338 U.S. 160 (1949).

60. *Id.* at 176.

61. *Id.* at 175, quoted in *Illinois v. Gates*, 462 U.S. 213, 241 (1983).

62. 378 U.S. 108 (1964).

63. 393 U.S. 410 (1969).

64. 462 U.S. 213 (1983).

65. *Id.* at 230.

66. *Id.* at 233.

cause for, say, the warrantless search of an automobile, the Court set out one standard: whether there was a reasonable basis for believing evidence of crime would be found in the place searched. Probable cause, the Court held, is probable cause, regardless of the context.

Similarly irrelevant is the nature of the items sought. In *New York v. P.J. Video, Inc.*,<sup>67</sup> the lower court suppressed five allegedly obscene videocassette movies that had been seized pursuant to a warrant. Stressing that there was a higher probable-cause standard for issuing warrants to seize items such as books and movies than for issuing warrants to seize other evidence or contraband, the court held that under this higher standard the affidavits presented to the magistrate contained insufficient information to establish probable cause to believe the seized movies were obscene under New York law.<sup>68</sup> Not so, ruled the Supreme Court late in its 1985-1986 term. The Court "recognized that the seizure of films or books on the basis of their content implicates First Amendment concerns not raised by other kinds of seizures,"<sup>69</sup> but specifically held that these concerns, while serving to highlight the importance of specific affidavits and critical magistrates, did not justify evaluating such warrant applications under a higher standard of probable cause than is used to review warrant applications generally. Once again, when assessing probable cause, the outcome-determinative issue is not the context in which the question is raised or the item for which the warranted or warrantless authorization is being sought, but whether there is a fair probability evidence of crime will be found in the area searched.

Once a magistrate has issued a search warrant pursuant to his determination that probable cause existed, his decision should not later be scrutinized by the courts in the form of a *de novo* review. Citing a strong desire to encourage unfettered recourse to the warrant process by law-enforcement officials, the *Gates* Court emphasized that reviewing courts should pay great deference to a magistrate's determination of probable cause. The Court reasoned that anything short of this deferential standard

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67. 106 S. Ct. 1610 (1986).

68. *Id.* at 1613.

69. *Id.* at 1614.

of review would encourage police to resort to warrantless searches, because the police, aware a warrant could later be invalidated, would conduct a warrantless search "with the hope of relying on consent or some other exception to the warrant clause that might develop at the time of the search."<sup>70</sup>

Notwithstanding the clear language of *Gates*, the Court was forced in the following term to restate in much stronger terms its positions on the standard to be used in determining probable cause for the issuance of a warrant and on the amount of deference given magistrates by reviewing courts. In *Massachusetts v. Upton*,<sup>71</sup> the Court chastised the Supreme Judicial Court of Massachusetts for continuing to apply the *Aguilar-Spinelli* test in determining *de novo* whether a warrant was lawfully issued and again warned "[w]e did not merely refine or qualify the 'two-pronged test.' We rejected it as hyper technical . . . ."<sup>72</sup> The lower court was also incorrect in the approach it took in reviewing the magistrate's finding of probable cause. Rather than simply deciding whether the evidence presented had provided the magistrate with a substantial basis for a finding of probable cause — as mandated by *Gates* — the reviewing court conducted a *de novo* probable cause determination. The *Upton* Court was succinct: "We rejected just such after-the-fact, *de novo* scrutiny in *Gates*."<sup>73</sup>

It may be asserted with some measure of certainty, therefore, that the controlling question with regard to the issuance of search warrants is whether, under the totality of the circumstances presented to the magistrate, a reasonable and prudent person would believe contraband or evidence may be located in the particular place alleged? Once that question is answered in the affirmative, it remains for the reviewing court to concur so long as the magistrate had a substantial basis for his determination.

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70. 462 U.S. at 236.

71. 466 U.S. 727 (1984).

72. *Id.* at 732.

73. *Id.* at 733.

## 2. Warrantless Searches and Seizures

But what about those searches and seizures that for diverse reasons are conducted without a warrant? There, too, the Court has been active, promulgating a "few specifically established and well-delineated exceptions"<sup>74</sup> to the warrant requirement. These exceptions, for the purposes of this discussion, may be grouped into six categories, divided according to the manner in which the evidence was obtained: while in plain view, consent search, during the exigencies of hot pursuit, automobile search, pursuant to a stop and frisk, and search incident to arrest.<sup>75</sup> Each shall be examined by first looking at the traditional or accepted statement of that exception, as set out in its leading case, and then noting any major doctrinal refinements or changes of the last several years.

### a. Plain View

The plain view doctrine was first explicitly addressed in 1971 in *Coolidge v. New Hampshire*.<sup>76</sup> According to that Court

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74. *Coolidge*, 403 U.S. at 454-55.

75. While these groupings may facilitate discussion of these varied doctrines, it will be noted that such classifications are far from perfect. Of the six groups, two — consent and plain view — are arguably not as much exceptions to the fourth amendment's warrant requirement as much as they are instances of fourth amendment inapplicability; and three — automobile, plain view, and hot pursuit — require probable cause, while the other three do not. More important, treating these exceptions separately ignores the fact that they can, and often do, overlap, e.g., the stop and frisk of the driver of an automobile. Indeed, even the term "exception" is a misnomer (albeit one with the imprimatur of the Supreme Court), because to call them exceptions implies that the fourth amendment requires a warrant — a notion addressed in the preceeding section of this article. Rather, the fruits of these warrantless activities are admissible, not because they are exceptions, but because they are "reasonable" and therefore satisfy the fourth amendment.

76. 403 U.S. 443 (1971). Although the Court in *Coolidge* writes as though the doctrine were of respectable lineage, historical research indicates that — much like Athena — the doctrine sprang full-grown from the plurality opinion in *Coolidge*. See Moylan, *The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle*, 26 MERCER L. REV. 1047 (1974). *United States v. Lee*, 274 U.S. 559 (1927) (holding that no search had occurred where cases of liquor were seen on the deck of a motorboat by use of a Coast Guard seachlight); *Ker v. California*, 374 U.S. 23 (1963) (holding that discovery of marijuana in full view on a kitchen counter during an arrest of the apartment's occupants was not a search); and *Harris v. United States*, 390 U.S. 234 (1968) (stating that the seizure of an automobile registration card by an officer who was securing the vehicle was not a search, but a measure taken to protect the automobile

(which struck down the warrantless seizure of an automobile present at the scene of an arrest), evidence obtained pursuant to a warrantless seizure by police is admissible only if three requirements are met: the officer was lawfully situated when he viewed the evidence, he came across it inadvertently, and it was immediately apparent to him that the observed item might be evidence of crime. While each of these factors has received much passing mention by the Court, it should be noted that the only case other than *Coolidge* in which the plain view doctrine has received thorough treatment is *Texas v. Brown*.<sup>77</sup> Accordingly, there has been no definitive consensus on the precise basis or limits of the doctrine. For example, while all of the cases which have addressed this issue, even obliquely, have treated plain view as distinct from a search (often holding a plain view seizure to entail no search at all), the plurality opinion in *Coolidge* makes the confusing statement that plain view does not occur until a search is already in progress.<sup>78</sup> There appears to be no support for this suggestion, however, particularly since the Court has upheld "plain view" not only where the officers were in the course of a search, but also where the plain view preceded a search or where there was no search at all. Nonetheless, while the doctrine's underpinnings are unclear, its existence is not. Thus, in *Brown*, where during a stop of an automobile an officer seized a heroin-filled balloon he had seen the driver drop onto his seat, the Court affirmed the seizure and the doctrine, while refining all three of *Coolidge*'s tests.<sup>79</sup>

*Brown* listed as the first requirement that the officer be legally situated when he first views the item and that the access to the object have some prior justification under the fourth amendment.<sup>80</sup> Notice the two distinct tiers of this requirement: not only must the officer be legally situated when he *sees* the item, but he must also have lawful access to the object in order to

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while in police custody, and that once the officer had opened the car door, the registration was plainly visible) had all tangentially or implicitly recognized the plain view doctrine. It remained for *Coolidge*, however, to give it life.

77. 460 U.S. 730 (1983). In both cases only four justices joined in the plain view part of the opinion.

78. 403 U.S. at 467.

79. *Id.* at 736-37.

80. *Id.* at 737.

seize it.<sup>81</sup> Although the first tier of this requirement would be satisfied where, say, an officer, while walking along the sidewalk, notices a marijuana plant in Mrs. Smith's kitchen window, the officer would not be permitted to seize the plant unless he had some additional justification permitting him to enter the house, e.g., a warrant based on his observation or an exigent circumstance such as the possible destruction of the plant by Mrs. Smith's son who saw the officer looking through the window. But if that is the case, then this requirement is little more than a logical application of the reasonableness clause of the fourth amendment, and Justice Rehnquist was correct, at least from an analytical perspective, when he suggested the plain view doctrine is better considered, "not as an independent 'exception' to the Warrant Clause, but simply as an extension of whatever the prior justification for an officer's 'access to an object' may be."<sup>82</sup>

However clear that assessment, the Court muddled the waters later that same term, in *Illinois v. Andreas*,<sup>83</sup> when it noted the plain view doctrine is grounded not on an officer's lawful presence, but "on the proposition that once police are lawfully in a position to observe an item first-hand, its owner's privacy interest in that item is lost."<sup>84</sup> While such a less-than-perfectly worded statement is understood when narrowly limited to the particular facts of that case — a warrantless reopening of a sealed container after a prior legal search — the Chief Justice's dictum has nonetheless proven confusing to many courts. It need not have. Bearing in mind the two tiers of lawful presence, it becomes apparent the Chief Justice was suggesting that once an item is seen in plain view, the owner loses his privacy interest in the item, but not necessarily in the access to that item.

To return to the earlier example, then, although Mrs. Smith may have lost her privacy interest in the marijuana plant, she did not necessarily lose any expectation of privacy in the "access" to the plant, i.e., the house. Such access must be independently justified. Accordingly, the *Brown* plurality, using *Coo-*

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81. *Id.*

82. *Id.* at 738-39.

83. 463 U.S. 765 (1983) (warrantless reopening of sealed container after prior legal search and controlled delivery held valid absent substantial likelihood that container contents were changed).

84. *Id.* at 771.

lidge's three-part test, found that both parts of the requirement of lawful presence had been met when a police officer stopped an automobile at a routine driver's license checkpoint, shined his flashlight into the car, and then seized the evidence viewed therein.<sup>85</sup>

A similar fact pattern was presented in *New York v. Class*.<sup>86</sup> Recall that there the Court struggled with the question of whether a police officer's penetration of an automobile to inspect a vehicle identification number constituted a search. After deciding it did, the Court rather perfunctorily held that the officer was lawfully situated when, once inside the vehicle, he noticed the handle of a pistol protruding from underneath the driver's seat, seized the weapon, and arrested the driver. None of these actions, observed the Court, violated the fourth amendment. In *Payton v. New York*,<sup>87</sup> on the other hand, the evidence was not admitted because the police had made an illegal entry into the defendant's apartment prior to seizing a shell casing which came into plain view only after they entered the residence. The Court there held that since the initial intrusion was illegal, it could not be used to justify the officer's presence, without which the evidence would not have been seen.<sup>88</sup> Where the foundation is rotten, the weight of "plain view" cannot be borne.

The second limitation on the plain view doctrine is that the discovery be inadvertent. In *Coolidge*, the plurality stated that the discovery of the evidence in plain view must not have been anticipated, the fear being that the police would try to justify a planned warrantless seizure by maneuvering themselves in plain view of the object they want. While the Court in *Brown* noted that fear, it cast some doubt on the continued vitality of that requirement by citing several lower-court decisions that had dispensed with the inadvertence requirement altogether.<sup>89</sup> More-

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85. *Brown*, 460 U.S. at 739-40. See also *Delaware v. Prouse*, 440 U.S. 648 (1979) (An officer, who had stopped a vehicle for routine check of the driver's license and the vehicle registration, observed marijuana on the car floor during the inspection. The Court struck down the seizure of the marijuana because, unlike *Brown*, the stop was random and was not based on any reasonable suspicion.).

86. 106 S. Ct. 960 (1986). See *supra* notes 55-56 and accompanying text.

87. 445 U.S. 573 (1980).

88. *Id.* at 601.

89. 460 U.S. at 743 n.8.

over, Justice White's concurrence in *Brown* emphasized that the Court did not endorse the inadvertence requirement.<sup>90</sup> It appears, therefore, that if it retains any vitality at all, the requirement of inadvertence means only that the intrusion giving rise to the plain view must not be a subterfuge for an otherwise illegal seizure.

Finally, *Coolidge* held that before a plain view seizure is justifiable, the prosecution must show that the item's contraband nature or evidentiary utility was immediately apparent to the officer who seized it.<sup>91</sup> This "immediately apparent" language seemed to suggest a higher standard than probable cause, but just how much higher was unclear. In *Payton*, the Court set the record straight: the officer need only have "probable cause to associate the property with criminal activity."<sup>92</sup> He need not be certain, nor need he know the actual crime committed. The officer must simply, when first seeing the item, have a reasonable belief that the viewed object has some connection with crime. Thus, although all that the officer in *Brown* could see were small opaque balloons, the Court held that the officer, based on his law-enforcement experience, had probable cause to believe the balloons contained an illicit substance.<sup>93</sup> The seizure was lawful, and the plain view doctrine continues as a valid exception.

#### b. *Consent Searches*

Equally valid, according to the Supreme Court in *Schneckloth v. Bustamonte*,<sup>94</sup> are searches conducted pursuant to consent. Much as with plain view, courts and commentators alike disagree as to whether a consent search is really a waiver rendering the fourth amendment inapplicable or a reasonable action meeting the amendment's requirements. In either case, such searches are lawful. In *Schneckloth*, the Court noted that searches conducted pursuant to consent were "one of the specifically established exceptions"<sup>95</sup> to the fourth amendment's war-

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90. *Id.* at 744 (White, J., concurring).

91. 403 U.S. at 466.

92. 445 U.S. at 587.

93. See *supra* text accompanying notes 77-82.

94. 412 U.S. 218 (1973) (consent of one of six passengers of a car to search that car held valid).

95. *Id.* at 219.



rant requirement and that for a consent to be valid, it must have been "freely and voluntarily given."<sup>96</sup> There was nonetheless "a square conflict of views between the state and federal courts"<sup>97</sup> as to what facts demonstrate "voluntarily given." Rejecting the notion that any single factor is dispositive, the Court once again embraced a totality of the circumstances approach. In particular, the Court held that when the subject is not in custody, the prosecution need not demonstrate that the subject knew of his right to refuse, but only that the consent was not the result of any duress or coercion. That the Court meant what it said in *Schneekloth* — that no single factor would be dispositive in determining whether a consent had been voluntarily given — was made clear three years later in *United States v. Watson*.<sup>98</sup> There, even though at the time of the consent the defendant was in custody and was not informed of his right to refuse, the Court upheld the consent as voluntary because of the presence of several other factors: there was no evidence of any duress or coercion by the police, the consent was given in a public street by an intelligent and well-educated individual, and the defendant had been given his *Miranda*<sup>99</sup> warnings.<sup>100</sup>

The similarities between the consent and the plain view doctrines became even more apparent in *Florida v. Royer*.<sup>101</sup> In that case, a suspect who fit a "drug-courier profile"<sup>102</sup> was approached at an airport by detectives who asked him to accompany them to a small room. Once inside, the agents retrieved the suspect's luggage without his consent and asked him if they could search its contents. The Court struck down the search as involuntary, distinguishing it from *United States v. Menden-*

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96. *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968) (search of house was unlawful because defendant's grandmother consented to search only after police officer told her he had a search warrant).

97. 412 U.S. at 223.

98. 423 U.S. 411 (1976).

99. *Miranda v. Arizona*, 384 U.S. 436 (1966).

100. *Watson*, 423 U.S. at 424-25.

101. 460 U.S. 491 (1983).

102. *Id.* at 493 n.2. The "drug-courier profile" is a set of characteristics found to be typical of persons transporting illegal drugs. In *Royer's* case, these characteristics included that he was young (between 25-35), casually dressed, and carrying heavy luggage; appeared pale and nervous, looking around at other people; paid for his ticket in cash with a large number of bills; and wrote only his name and destination on the airline ticket.

hall,<sup>103</sup> where the Court had upheld as consensual the search of a suspect's luggage, which took place after she had been detained at a Drug Enforcement Administration airport office. The Court noted that in *Mendenhall* the predicate detention of the defendant had been reasonable and lawful and that the defendant had expressly been told that she was free to decline to consent to the search.<sup>104</sup> In *Royer*, on the other hand, the detention preceding the consent was held to be illegal and, therefore, to have tainted any consent given during its span.<sup>105</sup> What may be adduced from the *Schneckloth-Royer* line of cases, then, is that one of the most important factors used in determining the voluntariness — and hence validity — of consensual searches is the lawfulness or reasonableness of the actions by the police leading up to the giving of the consent. In short, if when the consent was given, the parties were lawfully postured, then the subsequent search is probably valid and the fruits thereof admissible. If, conversely, the parties were not so postured, then the consent will probably be found to have been involuntary, and its fruits poison. So framed, the consent doctrine appears in reality to be yet another legitimate, commonsense application of the reasonableness clause of the fourth amendment.

c. *Hot Pursuit*

The next two topics may be grouped together. Both arise due to emergency or exigent circumstances, both dissolve once the predicate exigency is extinguished, and both require probable cause. Where this exigency is some threat to life and the probable cause is that a violent crime has just been committed, the doctrine is commonly called "hot pursuit." Where, however, the exigency is the likelihood of the disappearance of the automotive container in which there is probable cause to believe some evidence of crime is contained, the doctrine is termed the "automobile exception." The former shall be addressed first.

In *Warden v. Hayden*,<sup>106</sup> the Supreme Court was faced with the warrantless entry into, and search of, a house by police of-

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103. 446 U.S. 544 (1980).

104. *Royer*, 460 U.S. at 503-04 n.9.

105. *Id.* at 507-08.

106. 387 U.S. 294 (1967).

ficers. Stressing that an armed robbery had just taken place and that the suspect had entered the residence less than five minutes before the police arrived, the Court upheld the warrantless actions because "the exigencies of the situation made that course imperative."<sup>107</sup> Specifically, the Court held that such "hot pursuit" searches and seizures would be upheld where there is probable cause to believe that a violent crime has just been committed, that the individual who committed it is in the house, and that there is need for immediate action because delay would gravely endanger the officer's lives or the lives of others.<sup>108</sup> Accordingly, the Court upheld not only a search of the entire house for Hayden, but also an examination of areas — even a washing machine — where a weapon might have been hidden.<sup>109</sup>

While some contended the acceptance of the hot pursuit doctrine heralded the beginning of a steady erosion of the fourth amendment's protections, the Court soon indicated the doctrine would be narrowly construed and even more narrowly applied. In *United States v. United States District Court*,<sup>110</sup> the Court noted that since the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed,"<sup>111</sup> the police bear a heavy burden when attempting to demonstrate exigent circumstances to justify such actions. Early in 1984, the Court was given the opportunity to show just how heavy this burden was.

In *Welsh v. Wisconsin*,<sup>112</sup> the police made a warrantless arrest of the defendant in his home for driving while under the influence of alcohol (DUI). Although the offense had occurred only minutes before the arrest, the Court was emphatic in ruling that the warrantless nighttime entry by the police had violated the fourth amendment. The Court noted there was no immediate or continuous pursuit of the offender from his abandoned car and that Wisconsin statutes treat DUI as a civil, nonjailable traffic offense.<sup>113</sup> Opining that one of the most important factors

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107. *Id.* at 298 (quoting *McDonald v. United States*, 335 U.S. 451, 456 (1948)).

108. 387 U.S. 298-99.

109. *Id.* at 299-300.

110. 407 U.S. 297 (1972).

111. *Id.* at 313.

112. 466 U.S. 740 (1984).

113. *Id.* at 753-54.

in determining the validity of a hot pursuit search or seizure is the gravity of the underlying offense, the Court found that Welsh's offense and Wisconsin's treatment of it did not justify the officer's entry into the defendant's home.<sup>114</sup> While stopping short of requiring the predicate offense to be a felony, the Court did cite with approval several lower-court decisions which had so held.<sup>115</sup> It may be asserted, therefore, that in order for the hot pursuit doctrine to justify a warrantless entry into a home for the purpose of either an arrest or a search, the pursuit must follow hard upon the commission of a violent felony and must be reasonably necessary either to prevent physical harm to the officer and the public or — arguably — to avoid the destruction of evidence. Within such clearly defined limits, the doctrine of hot pursuit remains firmly grounded in the jurisprudence of the fourth amendment.

#### d. *Vehicle Searches*

A doctrine of similar genealogy, but greater moment, concerns evidence obtained from automobiles and was first recognized in the landmark decision of *Carroll v. United States*.<sup>116</sup> In that case, the Supreme Court upheld the warrantless search of an automobile because the police had probable cause to believe that bootleg liquor was being transported inside.<sup>117</sup> Due to the inherent mobility of motor vehicles, the possibility existed that the vehicle and its evidence would be gone by the time a warrant was secured. Noting that the fourth amendment's prohibition against unreasonable searches and seizures necessarily entailed the recognition of a distinction between searches of permanent structures and those of mobile ones, the Court concluded that

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114. *Id.* at 751-54.

115. *Id.* at 752-53.

116. 267 U.S. 132 (1925). It is crucial to a proper understanding of the analytical underpinnings of the automobile doctrine that it be viewed independently of the several other doctrines with which it often co-exists. Thus, the search of a motor vehicle may be valid as an incident to a lawful arrest, *New York v. Belton*, 453 U.S. 454 (1981); as pursuant to a lawful consent, *United States v. Watson*, 423 U.S. 411 (1976); as a product of plain view, *Harris v. United States*, 390 U.S. 234 (1968); or as motivated by safety concerns for either the property within the vehicle or the physical well-being of the police and members of the general public, *South Dakota v. Opperman*, 428 U.S. 364 (1976).

117. *Carroll*, 267 U.S. at 162.

vehicles, because of their mobility, could be searched without a warrant upon facts which would not justify the warrantless search of a house, provided that at the time of the search there was probable cause to believe that evidence of crime would be found.<sup>118</sup> Thus framed, the doctrine appeared to require the presence of both probable cause and exigent circumstances.

Nonetheless, in *Chambers v. Maroney*,<sup>119</sup> the Court upheld the warrantless search of an automobile even though the search occurred after both the automobile and its occupants had been taken to the police station and were under police control.<sup>120</sup> Stressing *Carroll*'s "constitutional difference between houses and cars,"<sup>121</sup> the Court observed that there had been probable cause to search the vehicle when it was stopped. Since the same probable cause still existed at the station house, the search at the station was lawful. What the Court failed to address, however, was the fact that the exigency — that "the car's contents may never be found again if a warrant must be obtained"<sup>122</sup> — was extinguished before the search occurred. Arguably, therefore, the *Carroll* doctrine ought not to have applied. Justice White attempted to gloss over this apparent flaw by noting that once the car arrived at the police station there was no practical difference between an immediate search without a warrant and the car's immobilization until a warrant could be obtained.<sup>123</sup>

It remained, however, for the Court in a string of cases culminating in *United States v. Chadwick*<sup>124</sup> to explain fully: "The

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118. *Id.* at 153.

119. 399 U.S. 42 (1970).

120. *Id.* at 52.

121. *Id.* at 52. Given the advance of technology in such areas as mobile homes, it becomes increasingly important to set out those factors that might be relevant in determining whether a hybrid structure more resembles a home or an automobile for the purposes of the fourth amendment. In *California v. Carney*, 105 S. Ct. 2066 (1985), the Court concluded that a motor home found stationary in a place not regularly used for residential purposes and with ready access to public highways, more resembled a car than a house and could, therefore, be searched without a warrant under the automobile doctrine.

122. *Chambers*, 399 U.S. at 51.

123. *Id.* at 51-52.

124. 433 U.S. 1 (1977); See *South Dakota v. Opperman*, 428 U.S. 364 (1976); *Texas v. White*, 423 U.S. 67 (1975); *Cardwell v. Lewis*, 417 U.S. 583 (1974); *Cady v. Dombrowski*, 413 U.S. 433 (1973).

answer lies in the diminished expectation of privacy which surrounds the automobile."<sup>125</sup> Acknowledging they had often sustained "warrantless searches of vehicles . . . in cases in which the possibilities of the vehicle's being removed or evidence in it destroyed were remote, if not nonexistent,"<sup>126</sup> *Chadwick* admitted that the *Carroll* doctrine had undergone change since its inception. Specifically, although it was initially based on the *actual* mobility of automobiles, the doctrine has come to rest on their *inherent* mobility and, to a greater extent, on the notion that individuals attach a lesser expectation of privacy to their cars than they do to their homes. Such diminished privacy interest is the result of an automobile's operation (traveling "public thoroughfares where both its occupants and its contents are in plain view"<sup>127</sup>); its regulation ("[a]utomobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls"<sup>128</sup>); and its nature ("we are aware of the danger to life and property posed by vehicular traffic"<sup>129</sup>). It follows, therefore, that a vehicle need not be capable of flight in order for the automobile doctrine to apply.

While *Chadwick* had settled one issue — that of the rationale underlying the automobile doctrine — it proceeded to raise two far more substantive ones: When does the doctrine justify the search of closed containers within the automobile? And how soon after the car is immobilized must the search occur to qualify as valid under the automobile doctrine? *Chadwick* involved the warrantless search of a locked 200-pound footlocker in the trunk of an automobile. Noting that the police had probable cause to seize the footlocker before it was placed in *Chadwick's* car, the Court struck down the search of the footlocker as

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125. 433 U.S. at 12.

126. *Id.* (quoting *Cady v. Dombrowski*, 413 U.S. at 441-42).

127. *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974).

128. *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976).

129. *Delaware v. Prouse*, 440 U.S. 648, 658 (1979). The Court nonetheless struck down an officer's random stop of a motorist for a check of his driver's license and vehicle's registration. "An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy. . . ." *Id.* at 622. In *New York v. Class*, 106 S. Ct. 960 (1986), however, the Court upheld the officer's reaching into the car for the vehicle identification number, because the stop was not random (the officer had observed *Class* driving above the speed limit) and because under New York law the VIN should have been visible from outside the car.

invalid.<sup>130</sup> Two years later, on facts similar to those in *Chadwick*, the Court in *Arkansas v. Sanders*,<sup>131</sup> struck down the warrantless search of a locked suitcase which had been placed in the trunk of a vehicle. In a separate concurrence, the Chief Justice opined that “[b]ecause the police officers had probable cause to believe that respondent’s green suitcase contained marihuana before it was placed in the trunk of the taxicab, their duty to obtain a search warrant before opening it is clear . . . .”<sup>132</sup> In sum, because it was the luggage, and not the automobile in which it was coincidentally placed, that was the suspected locus of the contraband, the automobile doctrine could not be used to justify any subsequent warrantless search of the luggage.

There soon followed *Robbins v. California*,<sup>133</sup> where the Court again struck down the search of a closed container — this time the warrantless opening of packages wrapped in opaque plastic discovered in the luggage compartment of a station wagon during a lawful warrantless search of the vehicle. This decision seemed to suggest that a warrantless search of a closed container found in an automobile could never be sustained as part of a warrantless search of the automobile itself. Unhappy with that implication, the Court, in the following term in *United States v. Ross*,<sup>134</sup> set out to clear up the substantial confusion engendered by the *Robbins* decision. In *Ross*, the Court upheld the warrantless search of a closed paper bag discovered in the trunk of an automobile during a search of that vehicle.<sup>135</sup> In so doing, the Court observed that the scope of a warrantless search of a container found in an automobile is defined, not by the nature or placement of the container, but “by the object of the search and the places in which there is probable cause to believe that [contraband] may be found.”<sup>136</sup> Thus — rejecting *Robbins* — the Court held that if there is probable cause to believe evidence will be found somewhere in the vehicle, then the officer may search the entire vehicle and any containers in which evi-

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130. 433 U.S. at 13.

131. 442 U.S. 753 (1979).

132. *Id.* at 766 (Burger, C.J., concurring).

133. 453 U.S. 420 (1981).

134. 456 U.S. 798 (1982).

135. *Id.* at 825.

136. *Id.* at 824.

dence might be found. At the same time affirming *Chadwick* and *Sanders*, the Court also held that if the police have focused their suspicion on a particular container that is later placed in a car, then neither the car nor the container may be searched without a warrant.<sup>137</sup>

Although the issue of the scope of the automobile doctrine may have been well-settled by *Ross*, the question of when the actual search must occur remains largely unsettled. Again, the rationale behind the automobile doctrine is two-fold: a lesser expectation of privacy in vehicles than in houses and the inherent mobility of vehicles. But, as was seen in *Chadwick*, the absence of the potential for flight — through, for example, police custody of the vehicle — does not preclude the application of the doctrine to validate a warrantless search, provided there is probable cause to believe evidence of crime is contained somewhere within the vehicle. The upshot is clear: the justification to conduct a warrantless search of an automobile does not disappear merely because the vehicle has been immobilized or taken into custody. This suggests there is no requirement that any warrantless search be conducted immediately after the vehicle is seized. Indeed, the Supreme Court has upheld a warrantless search of an automobile that took place seven days after the seizure of the vehicle pending forfeiture proceedings,<sup>138</sup> and one in which the driver was already in custody in a nearby patrol car.<sup>139</sup> In *Florida v. Myers*,<sup>140</sup> the Court even upheld a second warrantless search of a vehicle eight hours after it had been impounded by the police and while it was located in a locked, secure area. In so doing, the Court stressed that “the justification to conduct such a warrantless search does not vanish once the car has been immobilized.”<sup>141</sup>

Finally, in *United States v. Johns*,<sup>142</sup> the Court upheld the warrantless search of several packages three days after they were removed from the seized vehicle, setting out in some detail the present state of the law regarding the timing of an automobile

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137. *Id.*

138. *Cooper v. California*, 386 U.S. 58 (1967).

139. *Michigan v. Thomas*, 458 U.S. 259 (1982).

140. 466 U.S. 380 (1984).

141. *Id.* at 382 (quoting *Michigan v. Thomas*, 458 U.S. at 261).

142. 105 S. Ct. 881 (1985).



search: although the *Carroll* doctrine originally required probable cause plus exigent circumstances in the form of an automobile's inherent mobility in order to justify a warrantless search, it no longer does so in all cases. In particular, *Johns* held that, although the initial search or seizure of a vehicle generally still requires probable cause and the exigency of the possibility of flight, once the vehicle is lawfully in police custody there is no requirement that any subsequent search occur either immediately or even soon after the seizure for it to be valid.<sup>143</sup> This is because the justification for the subsequent search rests, not on the exigency, but on the combination of probable cause, safety to the seizing officer, accounting for the seized property, and the diminished expectation of privacy society posits in automobiles. While many particulars remain to be settled, this doctrine's general outlines have been clearly set by the Court, and the future bodes little chance of any retrenchment of its recent expansions.

e. *Investigative Stop and Frisk*

The presence of, and distinctions between the final two exceptions to the warrant requirement — search incident to arrest and stop and frisk — turn on the characterization of their predicate actions. If the initial intrusion constitutes an arrest, then any succeeding search incident to that arrest is tested for validity by one set of criteria. If, on the other hand, the predicate intrusion falls short of an arrest, resembling more a brief, investigative stop, then any subsequent search is tested for validity by an entirely different set of criteria. The first step, therefore, in an analysis of either a search incident to arrest or a stop and frisk is to determine the nature of the predicate action and, hence, which doctrine, if any, applies. The less intrusive of the two will be addressed first.

In *Terry v. Ohio*,<sup>144</sup> a police officer observed two men walking back and forth past a store window, pausing some two dozen times to stare into the window. Suspecting that the men were

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143. *Id.* at 887. The Court in *Johns* specifically left open the question of how long the officers may retain possession of a vehicle and its contents before they complete a vehicle search, noting only that if an owner can show that the delay "adversely affected a privacy or possessory interest," then the subsequent search would be unreasonable. *Id.*

144. 392 U.S. 1 (1968).

preparing to rob the store, the officer seized the defendant and searched him for weapons. The Court specifically noted that the officer's actions did not amount to an arrest; that, in any event, the officer did not have probable cause to make an arrest; and that a police officer's restraint on an individual's freedom to walk away, no matter how minimal, constitutes a seizure within the meaning of the fourth amendment. The real issue in *Terry* was whether the officer's actions were reasonable under the fourth amendment.<sup>145</sup> The answer to this question has become almost larger than life in the last two decades. Finding that the police officer, who had thirty years' experience in law enforcement, could have reasonably assumed, based on his observations, both that the men were contemplating a daylight robbery of the store and that they were armed, Chief Justice Warren upheld the officer's actions.<sup>146</sup> In particular, the Court determined that when an officer comes across what he believes to be suspicious persons, he may, in order to protect both himself and others, "conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him."<sup>147</sup>

Standing alone, the *Terry* opinion raised as many questions as it answered. Doubtless aware of this, the Court, on the same day it handed down *Terry*, also decided *Sibron v. New York*,<sup>148</sup> where it struck down a stop and frisk which was, at least superficially, similar to the one upheld in *Terry*. In *Sibron*, the officer stopped an individual who he suspected was carrying narcotics; the officer placed his hand into the individual's pocket, pulling out a glassine envelope filled with heroin.<sup>149</sup> Stressing that the officer never expressed any fear of bodily harm or any suspicion the accused was armed, the Court held that the search was invalid as unjustified at its inception.<sup>150</sup> It also held that even had the officer had a reasonable suspicion that the accused was armed, the scope of the search — thrusting his hand into the accused's pocket rather than an external pat down — was so

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145. *Id.* at 15-16.

146. *Id.* at 30.

147. *Id.*

148. 392 U.S. 40 (1968).

149. *Id.* at 45.

150. *Id.* at 64.

unrelated to that justification as to render the entire search unlawful.<sup>151</sup> In short, in order for a frisk to be lawful, it must be justified both at its inception, as based on a reasonable suspicion that the suspect is armed, and in its scope, as a limited exploration for weapons. The glassine envelope of heroin the officer retrieved from the defendant's pocket was ruled inadmissible.<sup>152</sup>

Although both *Terry* and *Sibron* treated the stop and frisk together, subsequent decisions by the Court have more correctly addressed them as distinct from each other. For example, in *Adams v. Williams*,<sup>153</sup> the Court held that in order for a weapons search to be justified under a stop and frisk theory, the stop preceding the search must also have been lawful.<sup>154</sup> In *Adams*, an officer received a tip from an informer, with whom the officer had prior dealings, that an individual seated in a nearby car was carrying narcotics and had a gun in his possession.<sup>155</sup> In upholding the officer's subsequent stop and frisk of the defendant, the Court greatly refined the law as first set out four years earlier in *Terry* and *Sibron*, resting its decision on two grounds. First, stop and frisk are two actions each of which must be independently justified, with an illegal stop tainting an otherwise valid frisk.<sup>156</sup> And second, the reasonable suspicion for both a stop and frisk may be based on hearsay as well as on personal observation.<sup>157</sup> Such holdings, taken together with *Sibron* and *Terry*, left little doubt as to the procedure required in assessing the admissibility of any evidence derived from a stop and frisk. The stop must be tested, first, in its inception, and second, in its scope. Then, and only after the stop has been found valid, may the frisk be similarly tested. In this regard, and addressing all four tiers of the analysis, no fewer than eight cases in the last several terms of the Supreme Court have had occasion to consider the present state of the law of investigative detentions.

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151. *Id.* at 65.

152. *Id.* at 64-66.

153. 407 U.S. 143 (1972).

154. *Id.* at 149. See also *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (frisk for weapons was permissible when an officer observed a bulge in the jacket of a man who had been ordered out of his car after being stopped for a traffic violation).

155. 407 U.S. at 144-45.

156. *Id.* at 147-48.

157. *Id.* at 143.

In 1983, in *Michigan v. Long*,<sup>158</sup> the Court was faced with the question of the geographic bounds of the scope of an otherwise valid *Terry* stop and frisk. Defendant Long's car had run into a ditch and the police had stopped to investigate. After noticing a knife on the floor of the car, the officer patted Long down and searched the inside of the car.<sup>159</sup> Stressing the particularly hazardous nature of roadside encounters between police and suspects, the Court held that a limited search of the passenger compartment of a car is permissible under *Terry* if the officer has a reasonable belief that the suspect is dangerous and could gain immediate control of any weapons in the vehicle. The search in *Long* was upheld.<sup>160</sup>

In the same year, the Court also began to address the temporal bounds of an investigative detention. In *United States v. Place*,<sup>161</sup> Drug Enforcement Administration agents, suspecting that the defendant was carrying narcotics, stopped him at an airport terminal and seized his luggage for ninety minutes, at which time they used a drug-detection dog on the luggage.<sup>162</sup> Specifically holding that the initial stop of Place was valid,<sup>163</sup> the Court nonetheless struck down the subsequent search of the luggage because the ninety-minute delay exceeded the permissible scope of a *Terry* stop.<sup>164</sup> Similarly, in *Florida v. Royer*,<sup>165</sup> state narcotics officers, having determined that the defendant fit a drug-courier profile, detained him at the airport, took both his airline ticket and driver's license, and then seized his luggage. Once again, the Court held that the stop of the defendant on less than probable cause was permissible, but that the actions of the officers in taking the defendant to a large storage closet and in retaining his airline ticket exceeded the scope of *Terry*.<sup>166</sup>

It was beginning to appear as though the Burger Court, so active in other fourth amendment areas, was content with the

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158. 463 U.S. 1032 (1983).

159. *Id.* at 1035-36.

160. *Id.* at 1050-51.

161. 462 U.S. 696 (1983).

162. *Id.* at 698-99.

163. *Id.* at 706.

164. *Id.* at 710.

165. 460 U.S. 491 (1983). See *supra* notes 101-02 and accompanying text.

166. *Royer*, 460 U.S. at 507-08.

Warren Court's explication of investigative detentions. Then came 1985 and the dike burst. In a string of five cases, four of which were decided in favor of the government, the Court expanded the types of suspicion that may justify a stop and the sources of information which may be used to raise those suspicions. The Court also specifically refused to establish a *per se* rule regarding the length of such detentions and equally clearly indicated its continuing transfixion with the narcotics trade.

The only case decided in favor of the defendant, *Hayes v. Florida*,<sup>167</sup> was simply a reaffirmation of an earlier Court holding some sixteen years earlier.<sup>168</sup> In *Hayes*, the police, without consent or probable cause, transported a suspect from his home to the police station for fingerprinting.<sup>169</sup> The Court ruled that such actions more resembled arrests — thereby triggering the fourth amendment's probable-cause requirement — than they did investigative stops, which required only reasonable suspicion.<sup>170</sup> Conversely, the government's victories were more substantial.

In *Florida v. Rodriguez*,<sup>171</sup> a Florida trial court suppressed evidence found in a drug courier's luggage during a search at the airport, holding the defendant's furtive behavior and statement to his companion, "let's get out of here," had not furnished the officers with proper grounds for a *Terry* stop.<sup>172</sup> Acting summarily, the Supreme Court reversed, noting that such actions did in fact constitute articulable suspicion sufficient to justify the defendant's brief detention.<sup>173</sup>

Further expanding the sort of suspicion upon which a *Terry* stop and frisk may be based, the Court handed down a deceptively significant decision in *United States v. Hensley*,<sup>174</sup> where officers from one police department, based on a bulletin from

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167. 105 S. Ct. 1643 (1985).

168. *Davis v. Mississippi*, 394 U.S. 721 (1969) (defendant's fingerprints taken during illegal detention inadmissible).

169. *Hayes*, 105 S. Ct. at 1645.

170. *Id.* at 1646-47. Note how Justice White, writing for a five-Justice majority, hedged his bet by opining that, were the police able to fingerprint a suspect on the spot and in a reasonable fashion, such actions might fit within the limits of *Terry*.

171. 105 S. Ct. 308 (1984).

172. *Id.* at 309-10.

173. *Id.* at 310-11.

174. 105 S. Ct. 675 (1985).

another department, stopped an individual suspected of armed robbery. In striking down the stop and subsequent frisk, the United States Court of Appeals for the Sixth Circuit held that *Terry* stops are not applicable to completed crimes and that police from one jurisdiction may not make a *Terry* stop based on the articulable suspicions of another jurisdiction. Suspicion, they held, is simply not a transferable commodity.<sup>175</sup> Writing for a unanimous Court, Justice O'Connor observed that the Court of Appeals was wrong on both counts. As to whether an individual could be stopped as suspected of a completed crime, rather than of an imminent or ongoing one, the Court conceded the justifying exigencies of crime prevention and public safety were not as pronounced for completed conduct, but that — once again — on balance such stops fell within the rationale underlying *Terry*.<sup>176</sup> *Hensley* held that — at least for felonies — the government's interests served by the ability to make brief, non-probable-cause stops for completed crimes outweigh the intrusion upon an individual's right to avoid such limited stops.<sup>177</sup> As to the second issue — the transferability of suspicion from one police department to another, without transferring also all the facts upon which the suspicion was based — the Court again ruled in favor of the government. In so holding, the Court set out two requirements: the department which issued the bulletin must have had a reasonable suspicion the named individual was involved in the crime; and an objective reading of the bulletin must indicate that the stopped individual was wanted, at least for questioning, by the issuing jurisdiction.<sup>178</sup> This authority to stop, however, was not unlimited. While the stopping officer could detain *Hensley* in order to ask him a few questions and inform him that he was wanted for questioning in another jurisdiction, it would have exceeded the permissible scope of a *Terry* stop had the officer detained the suspect until the issuing department had the opportunity to question him.<sup>179</sup>

Having thus addressed and significantly expanded the vari-

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175. *Id.* at 679.

176. *Id.* at 680-81.

177. *Id.* at 681.

178. *Id.* at 681-83.

179. *Id.* at 684.

ous bases upon which a stop or frisk may be initiated, the Court next turned to the issue earlier raised in *Place* and *Royer*: the temporal bounds of such actions. In *United States v. Sharpe*,<sup>180</sup> the United States Court of Appeals for the Fourth Circuit held that the twenty-minute detention of a truck camper and its driver, based on an admittedly reasonable suspicion the camper was loaded with marijuana, was illegal because the length of the driver's detention had turned the investigatory stop into an arrest without the requisite probable cause.<sup>181</sup> Focusing solely on whether the length of the detention was unreasonable, the Supreme Court held that the issue turns, not on the actual length of the stop, but on whether the officer's actions during the detention were reasonably related to, and rendered necessary by, the particular circumstances of the stop.<sup>182</sup> The Court found the delay in *Sharpe* was attributable solely to the actions of the two defendants, who split up when first approached by the officers. Once the officer caught up with fleeing defendant, Sharpe, the officer acted reasonably and diligently. The somewhat prolonged detention, accordingly, was legitimate.<sup>183</sup>

The *Sharpe* decision did not conflict with earlier decisions of the Court.<sup>184</sup> In earlier decisions, such as *Royer*<sup>185</sup> and *Dunaway v. New York*,<sup>186</sup> the detentions had turned into *de facto* arrests, not because of the duration of the stops, but because of what the officers did during the detentions. In *Dunaway*, the suspect was detained and interrogated at a police station, while in *Royer*, the suspect was confined in a small airport room for questioning. The thrust of the Court's holding was precise: there is simply no "hard-and-fast time limit for a permissible *Terry* stop."<sup>187</sup> Instead, the Court will look to all the factors involved — the interests served and the intrusion suffered — to

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180. 105 S. Ct. 1568 (1985).

181. 712 F.2d 65 (1983).

182. *Sharpe*, 105 S. Ct. at 1574-76.

183. *Id.* at 1576.

184. *Id.* at 1575.

185. See *supra* notes 165-66 and accompanying text.

186. 442 U.S. 200 (1979).

187. *Sharpe*, 105 S. Ct. at 1575. See *Michigan v. Summers*, 452 U.S. 692 (1981) (upholding the seizure of a person who was leaving his home as police officers arrived to execute a warrant to search the premises for narcotics, finding that it was reasonable for the officers to detain Summers for the duration of the proper search).

determine whether, on balance, the officer's actions were reasonable.

Whether the Court meant what it said in *Sharpe* was quickly put to the test in *United States v. Montoya de Hernandez*.<sup>188</sup> There, the Court was faced with a sixteen-hour detention at an airport of a suspected alimentary-canal drug smuggler. Taking notice of the "veritable national crisis in law enforcement caused by smuggling of illicit narcotics,"<sup>189</sup> the Court held a detention at the border is justified at its inception if, given the totality of the circumstances and even absent many outward signs of illegal activity, the stopping officers reasonably suspect the traveler is engaged in narcotics smuggling or other criminal activity.<sup>190</sup>

Holding that the stop of Montoya de Hernandez was valid, the Court passed on to the more complex issue of the scope of the stop. Justice Rehnquist acknowledged the detention was longer than any previously upheld by the Court, but on balance, nonetheless found the length of the detention to be reasonable.<sup>191</sup> Again stressing that the scope of the detention be measured, not by time, but by the stopping officer's actions, the Court noted that suspicions of alimentary-canal smuggling cannot be either confirmed or disproved in the time ordinarily allowed for a *Terry* stop unless an X-ray is used.<sup>192</sup> In *Montoya de Hernandez*, however, the defendant had refused to consent to an X-ray. Moreover, during her sixteen-hour wait, the defendant had also refused to defecate until the officers obtained a court order for an X-ray and rectal search. Thus, observed the Court, the entire length of the stop was due solely to the defendant's decisions to attempt to smuggle drugs into the country, to refuse to submit to an X-ray, and to refuse to produce a monitored bowel movement. She could not, on the one hand, be so adamant

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188. 105 S. Ct. 3304 (1985).

189. *Id.* at 3309.

190. *Id.* at 3310-11. *See, e.g.*, *United States v. Cortez*, 449 U.S. 411 (1981) (upholding brief detention at border of individual suspected of escorting illegal aliens into this country); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (upholding the use of permanent checkpoints at the Mexico-United States border); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (upholding vehicle stops by roving border patrol agents along the Mexican border to ascertain citizenship).

191. *Montoya*, 105 S. Ct. at 3311-13.

192. *Id.* at 3312.



in her refusal to comply with the reasonable requests of law-enforcement officials and, on the other hand, be heard to complain about the predictable results of her actions.

The highly specialized context of Montoya de Hernandez's detention — a border search of a recalcitrant, alimentary-canal drug smuggler — prevents the drawing of any generalized conclusions applicable in other contexts. However, two sentiments suggest themselves: the Court has declared an all-out war on drug smuggling, and the Court refuses to set any *per se* rule as to the length of investigative detentions.<sup>193</sup>

What may be gleaned from the Court's recent treatment of *Terry* stop and frisks are several broad-based conclusions. First, any time evidence is derived from a *Terry* frisk, both the stop and the frisk must satisfy the fourth amendment in order for the evidence to be admissible. For a stop to be valid, there must be an articulable and reasonable suspicion that the person stopped is somehow involved in a past, present, or imminent crime, and the actions of the stopping officers must be reasonably related — in time and intrusiveness — to the basis of the stop. For a frisk to be valid, it must be based on an articulable and reasonable suspicion that the frisked person may be armed, and it must be limited to an external pat-down and, if applicable, a sweep of the immediate area. What must be kept in mind in an analysis of such actions is that investigative detentions are governed by a very fluid concept: totality of the circumstances. The Court tilts the balancing scales more in the government's favor where its interests are heightened — such as during roadside encounters, at its borders, or involving illicit drug trade — and more in the individual's favor where his interests are stronger — such as in the home and other areas in which society posits a reasonable expectation of privacy. Having struck such a precarious balance in such a potentially explosive area,

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193. In this regard, compare *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983), where the Supreme Court upheld the warrantless, suspicionless boarding of a vessel near a port of entry by customs officials. Noting that the boarding of the sailboat pursuant to 19 U.S.C. § 1581(a) was reasonable within the meaning of the fourth amendment, the Court stressed that its holding should not be applied to other contexts. For example, while the boarding of a vessel near the border is reasonable, the similar random and suspicionless stopping of automobiles on a public highway near the border would not be. See *supra* note 85 and accompanying text.

the Court can do little but expect much future activity in this area of the law.

f. *Searches Incident to Arrest*

The final topic, the search conducted incident to a valid arrest, has received relatively scant treatment during the last several terms. The first issue here is the nature of the action preceding the search. Once this action has been determined to be a lawful arrest based on the requisite probable cause, attention then focuses on the nature of the search from which the evidence derived. In this regard, the Supreme Court has held that an officer, upon a lawful arrest, may search the "area 'within [the arrestee's] immediate control,' " often called the *Chimel* perimeter.<sup>194</sup> The officer need not have any reason to believe the search will turn up either weapons or evidence. The authority to conduct the search — while generally based upon the need to disarm the arrestee and to discover evidence — is actually established by the very fact of the arrest, with no additional justification being necessary.<sup>195</sup> The only question before any court, therefore, is whether the scope of the search was both temporally and spatially commensurate with the confines of *Chimel*.

Realizing that "[a] police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment,"<sup>196</sup> a majority of the courts, to include the Supreme Court, have adopted an equally *ad hoc* approach to determine whether a place searched was within an area the searching officer could have reasonably believed the arrestee could reach. Thus, in *United States v. Chadwick*,<sup>197</sup> where an officer searched Chadwick's 200-pound footlocker at a police station an hour and a half after Chadwick had been arrested and after the footlocker had been reduced to the exclusive control of the police, the Court easily held the ac-

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194. *Chimel v. California*, 395 U.S. 752, 768 (1969) (search of defendant's home, which went far beyond area from within which he might have obtained weapons, was illegal and his burglary conviction was overturned).

195. *United States v. Robinson*, 414 U.S. 218 (1973) (officer who arrested defendant could fully search him even where the arrest was for a traffic violation and even though the officer did not suspect that the defendant was armed or dangerous).

196. *Id.* at 235.

197. 433 U.S. 1 (1977).

tions to be illegal and not a search incident to arrest. Once the property was so reduced, there simply was "no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence."<sup>198</sup> Absent such exigencies, a search cannot qualify as one incident to arrest.

Notwithstanding what seemed to be a rather clear-cut approach to the permissible scope of a search incident to arrest — namely, to determine whether the officer reasonably believed the arrestee could have reached the area searched — the Court was soon forced to admit that in many contexts such an approach had failed to produce either a straightforward rule or a workable definition of *Chimel's* area within the immediate control of the arrestee.<sup>199</sup> *New York v. Belton*<sup>200</sup> addressed one such context: the arrest of the driver or passenger of an automobile.

Noting how frequently this factual situation arises and how widespread the confusion is, both by officers as to the scope of their authority and by individuals as to the extent of their constitutional protections, the *Belton* court decided to forsake its approved *ad hoc* approach and set out to "determine the meaning of *Chimel's* principles in this particular and problematic context."<sup>201</sup> The Court's holding was precise: Where an officer has made a lawful arrest of the occupant of an automobile, "he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile,"<sup>202</sup> to include any containers found therein, but not including the closed trunk of that automobile. This bright line rule is justified, the Court stressed, because the search is based, not on the notion that the arrestee has no privacy interest in the car or its contents, but on the fact that the arrest itself justifies the infringement of any privacy interest the arrestee may have.<sup>203</sup> It logically follows that any containers found in the passenger compartment may be

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198. *Id.* at 15.

199. See LaFave, "Case-by-Case Adjudication" Versus "Standardized Procedures": *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 141.

200. 453 U.S. 454 (1981) (police officer stopped automobile for speeding and, after smelling and observing marijuana, arrested all four occupants, separated them outside the car, and then searched the interior of the car, finding cocaine in a zippered jacket pocket in the back seat).

201. *Id.* at 460 n.3.

202. *Id.* at 460.

203. *Id.* at 461.

searched regardless of whether they are open or closed and regardless of any expectations of privacy either society or the owner posits in those containers. Nor, held *Belton*, does it matter whether the occupants are still inside the vehicle or whether they could, in fact, have reached its interior. What does matter, however, is that the expansive *Belton* rule not be applied to all arrest scenarios. Justice Stewart made it clear the Court would continue to use the *ad hoc* approach outlined in *Chadwick* in all cases not involving automobiles.<sup>204</sup>

In addition to defining the spatial scope of a search incident to arrest, the Court has also considered its temporal scope. Properly framed, the question is how soon after the arrest must the search occur to qualify as a contemporaneous incident thereto? In *Illinois v. Lafayette*,<sup>205</sup> an individual was arrested for disturbing the peace and was taken to a police station. In the process of booking Lafayette, the police conducted a warrantless search of his shoulder bag for the purposes of inventorying his personal effects. They discovered illegal drugs. In upholding the officer's actions, Chief Justice Burger noted that an inventory at the station house is no more than a continuation of the custody inherent in the arrest status, with an inventory search being merely one event along the continuum from arrest to incarceration. Naturally, different factors come into play at different points along this continuum. But rather than finding that the governmental interests served by an arrestee's search diminish as time passes after the arrest, the Court specifically held that those "interests underlying a station-house search of the arrestee's person and possessions may in some circumstances be even greater than those supporting a search immediately following arrest."<sup>206</sup> For example, once inside the station house, there is, in

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204. *Id.* at 461-62. Note the Court's eminently logical treatment of the automobile when it collides with a *Terry* stop and frisk or with a search incident to arrest. When the officer's predicate actions are measured by a lesser standard — for example, reasonable suspicion — the narrowness of the permissible scope of the search so reflects; but where the standard is higher — for example, probable cause — so is the scope broader. Thus, if the occupant of the car is arrested, then the officer may search the entire passenger compartment and any containers found therein, whereas if the occupant is only stopped, then the officer must limit his search to that part of the car from which the suspect might reasonably gain immediate control of weapons.

205. 462 U.S. 640 (1983).

206. *Id.* at 645.

addition to the need to remove weapons and prevent the destruction of evidence, the need to inventory property found on an arrestee in order to deter false claims of property loss by the owner and to inhibit theft of any articles by those employed in police activities. *Lafayette* also suggested that certain activities, such as the disrobing of an arrestee, while unreasonable or embarrassingly intrusive on the street, would be, under certain circumstances, permissible at the station house.<sup>207</sup> Therefore, since the officer could have searched the bag at the time of the arrest, he also *a fortiori* could have lawfully searched it when booking the defendant.

When viewed from an analytical perspective, *Lafayette* is really little more than a reaffirmation by the Court of the approach adopted in *Chadwick*. The shoulder bag was still in the possession and control of Lafayette. Applying the *Chimel* test, it is clear the bag was within the arrestee's immediate grasp and, hence, could have been searched. *Lafayette* simply removed any requirement — imagined or otherwise — that the search occur at the inception of the arrest, illustrating the Court's view of the entire arresting procedure as a continuum with different and competing interests at stake depending on where along that continuum the search takes place. Once the item in question is reduced to the exclusive control of the police, however, then a search of it may no longer be justified as incident to an arrest. In sum, it will be noted that the law in this area is refreshingly lucid: immediately upon arrest and for a reasonable time thereafter, an officer may search the person of an arrestee and the area which he reasonably believes to be within the arrestee's immediate control, with the provision that the entire passenger compartment of an automobile and all containers found inside are presumed to be within the occupant's grabbable area.

### C. *Sanctions of the Fourth Amendment*

Once it has been determined that the fourth amendment has been both triggered and violated, it remains only to determine what sanction, if any, will be used, since — the fears of

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207. The Court specifically declined to discuss "the circumstances in which a strip search of an arrestee may or may not be appropriate." *Id.* at 646 n.2.

many critics notwithstanding — not all violations of the fourth amendment by the government are punished. The sanction, of course, is the exclusionary rule and the question thus becomes whether or not it shall be invoked to exclude the tainted or illegally derived evidence from the courtroom.<sup>208</sup>

### 1. *Invocation of the Exclusionary Rule*

This doctrine requiring courts to suppress evidence whenever it is the product of unlawful governmental conduct has long occupied its position as the enforcement mechanism of the fourth amendment. Indeed, soon after the rule's birth in *Weeks v. United States*,<sup>209</sup> the Supreme Court extended its reach in *Silverthorne Lumber Co. v. United States*<sup>210</sup> to include, not only the illegally obtained evidence itself, but also any evidence directly or indirectly derived from the primary evidence. Almost from the outset, however, and perhaps wary that the exclusionary rule's heavy hand would be overworked, the Court began to carve out exceptions to its usually fatal application. For example, while *Silverthorne* extended the rule to encompass derivative evidence, it also noted that such information does not automatically become "sacred and inaccessible"<sup>211</sup> and specifically held that in certain circumstances, such as where "knowledge of [the evidence] is gained from an independent source,"<sup>212</sup> the evi-

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208. See J.H. WIGMORE, WIGMORE ON EVIDENCE § 2184, at 40 (3d ed. 1940) ("Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else."); *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) ("To declare that in the administration of the criminal law the end justifies the means — to declare that the Government may commit crimes in order to secure the convictions of a private criminal — would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face."); *Olmstead*, 277 U.S. at 470 (Holmes, J., dissenting) ("I think it a less evil that some criminals should escape than that the Government should play an ignoble part."); *People v. Defore*, 242 N.Y. 13, 21, 23-24, 150 N.E. 585, 587-88 (1926) (Cardozo, J.) ("The criminal is to go free because the constable has blundered. . . . A room is searched against the law, and the body of a murdered man is found. . . . The privacy of the home has been infringed, and the murderer goes free.").

209. 232 U.S. 383 (1914). This was the first Supreme Court case to recognize the exclusionary rule. The first use of the exclusionary rule was in *State v. Sheridan*, 121 Iowa 164, 96 N.W. 730 (1903).

210. 251 U.S. 385 (1920).

211. *Id.* at 392.

212. *Id.*

dence may be admissible.

Echoing the same sentiment in *Nardone v. United States*,<sup>213</sup> the Court announced that evidence would not be excluded where it is demonstrated that the connection between the illegally acquired evidence and the official illegality has "become so attenuated as to dissipate the taint."<sup>214</sup> Subsequently, in *Wong Sun v. United States*<sup>215</sup> the Court elaborated on the principle that illegally obtained evidence need not always be suppressed. Observing that the prime purpose of the exclusionary rule is to deter governmental misconduct by depriving police of the beneficial products of such misconduct, *Wong Sun* held that the crucial question to be asked in such a case is whether the objected-to evidence resulted from an "exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."<sup>216</sup> Where the latter is the case, the purpose of the rule would not be served by its invocation and, therefore, should not be called upon. Nor, continued the Burger Court in *United States v. Janis*,<sup>217</sup> should the rule be applied beyond the context of a criminal prosecution without first weighing the likely social benefits of excluding unlawfully seized evidence against the likely costs of losing such evidence and the less accurate or more cumbersome adjudication that usually follows.

Consonant with the fact that the exclusionary rule is merely a judicially created remedy that courts should call upon only when necessary (as opposed to a constitutional requirement applicable in all circumstances<sup>218</sup>), the basic rule of thumb relied upon by the courts and which may be gleaned from the rule's first seventy years is that it is to be used only when the legitimate goal of deterrence of police misconduct would be served by

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213. 308 U.S. 338 (1939).

214. *Id.* at 341. This holding has given rise to frequent discussion of an attenuation exception to the exclusionary rule. Far from being an exception, the language in *Nardone* merely underscored the necessity of a causal relationship between the primary illegality and the discovery of the evidence in order to suppress the evidence.

215. 371 U.S. 471 (1963).

216. *Id.* at 488 (quoting J. MAGUIRE, EVIDENCE OF GUILT §5.07, at 221 (1959)).

217. 428 U.S. 433 (1976) (a federal civil tax proceeding in which the Court refused to invoke the exclusionary rule).

218. *Stone v. Powell*, 428 U.S. 465 (1976); *United States v. Calandra*, 414 U.S. 338 (1974).

the exclusion of the tainted evidence. Analytically, the approach to this rationale comprises two discrete inquiries: first, does the exclusionary rule apply to the context at hand? And second, does any judicially accepted exception work to prevent its otherwise proper application? Over the last several terms, the Supreme Court has had five occasions to refine and test both this rationale and this approach.

In *INS v. Lopez-Mendoza*,<sup>219</sup> the Supreme Court was confronted with the question of how to determine whether the exclusionary rule should be applied at a deportation hearing. Two aliens, Lopez-Mendoza and Sandoval-Sanchez, had been ordered deported by an Immigration Judge after having been summoned to the deportation hearing following an allegedly unlawful arrest by Immigration and Naturalization Service (INS) agents.<sup>220</sup> Noting that respondent Lopez had objected only to the fact that he had been produced at the hearing following the unlawful arrest, the Court held against Lopez without ever reaching the issue of whether the arrest was unlawful because "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest."<sup>221</sup>

Respondent Sandoval, however, presented a more substantive claim by objecting to the admission of his post-arrest statement confessing to his illegal entry into this country, evidence which would have been excluded at a criminal proceeding.<sup>222</sup> Never having squarely addressed the question of the precise reach of the exclusionary rule beyond the context of a criminal proceeding, the Court turned to the framework set out in *United States v. Janis*<sup>223</sup> for deciding in what types of proceedings ap-

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219. 468 U.S. 1032 (1984).

220. *Id.* at 1034-38.

221. *Id.* at 1039. *See also* Gerstein v. Pugh, 420 U.S. 103 (1975) (person arrested without a warrant entitled to timely determination by neutral magistrate of probable cause for significant pre-trial restraint, but subsequent conviction not vacated on such grounds); Frisbie v. Collins, 342 U.S. 519 (1952) (jurisdiction to try a person for a crime not impaired by fact that defendant was forcibly abducted into state).

222. *Lopez-Mendoza*, 468 U.S. at 1040-41.

223. 428 U.S. 433 (1976). *See, e.g.,* United States v. Havens, 446 U.S. 620 (1980) (illegally obtained evidence may be used in proper cross-examination for impeachment purposes); Stone v. Powell, 428 U.S. 465 (1976) (exclusionary rule inapplicable to collateral review by way of habeas corpus); United States v. Calandra, 414 U.S. 338 (1974)



plication of the rule is appropriate. This framework is built on a cost-benefit analysis in which the likely social benefits of excluding unlawfully seized evidence are weighed against the likely costs. Applied to the facts of *Lopez-Mendoza*, the Court was persuaded that the *Janis* balance weighed against applying the rule because its sole purpose — deterrence of future unlawful police conduct — was not served by its invocation. Specifically, the Court found that the INS's own comprehensive scheme for deterring fourth amendment violations by its officers — while far from perfect — was sufficient to obviate the need for the working of the exclusionary rule by rendering *de minimis* any deterrent value its application might have in a non-criminal hearing.<sup>224</sup>

## 2. *Exceptions to the Exclusionary Rule*

If, however, the context is a criminal prosecution or, in the alternative, a non-criminal proceeding in which *Lopez-Mendoza's* cost-benefit analysis weighs in favor of applying the exclusionary rule, then the next step is to determine whether any one of the three judicially accepted exceptions applies. These are the independent source, inevitable discovery, and good faith exceptions; the last two are of recent vintage.

### a. *Independent Source Exception*

In *Segura v. United States*,<sup>225</sup> the defendants moved to suppress two sets of evidence seized from their apartment during a warrantless initial entry and a subsequent warrant search. Pursuant to an investigation, police arrested defendant Segura in the lobby of his apartment building, took him to his apartment, knocked on the door, and entered without permission when the door was opened by the female defendant Colon. After observing various drug paraphernalia in plain view inside the apartment, two officers took the defendants to police headquarters, while another two remained behind awaiting a search warrant that had been sent for before the initial entry into the apartment.

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(exclusionary rule inapplicable to grand jury considerations).

224. *Lopez-Mendoza*, 468 U.S. at 1044-45.

225. 468 U.S. 796 (1984).

Some nineteen hours later, the warrant was issued and the subsequent search revealed three pounds of cocaine and other evidence.<sup>226</sup>

At the outset, the Court noted that the issue before it was narrow and precise: Assuming the initial warrantless entry was unlawful and the subsequent search warrant was valid, the Court considered only whether those items "not observed during the initial entry and first discovered by the agents the day after the entry, under an admittedly valid search warrant, should have been suppressed."<sup>227</sup> The Court's answer was equally precise. Since none of the information on which the warrant was secured was derived from the illegal entry into the defendant's apartment, the exclusionary rule's avowed purpose would not be served by excluding the evidence. Accordingly, and stressing that the remedial nature of the rule controls its application, the Court held that the evidence obtained pursuant to the warrant was admissible under the independent source exception as first laid out in *Silverthorne Lumber Co. v. United States*.<sup>228</sup> In sum, where the prosecution can show that the evidence was derived from a source independent of the illegal activity, such evidence will not be excluded.

#### b. *Inevitable Discovery Exception*

A second exception, announced by the Supreme Court in *Nix v. Williams*<sup>229</sup> and consistent with the principles underlying both the independent source doctrine and the good faith exception, is the inevitable discovery doctrine. Specifically, this exception is based on the question of causation and whether the police misconduct was indispensable to the discovery of the evidence. Where it is not indispensable and some factual nexus between the evidence and an unrelated, untainted source can be shown, the evidence will not be excluded. This is grounded on the proposition that no purpose is served by excluding evidence that would have been discovered even without the misconduct.

This doctrine was first hinted at in an oft-cited footnote in

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226. *Id.* at 800-01.

227. *Id.* at 804.

228. 251 U.S. 385 (1920) cited in *Segura*, 468 U.S. at 805.

229. 467 U.S. 431 (1984).

*Brewer v. Williams*,<sup>230</sup> where the defendant's murder conviction was overturned because an investigator had illegally obtained incriminating evidence after he had given the defendant the famous "Christian burial speech."<sup>231</sup> In reviewing the *Nix* case (which was Williams' second journey through the state and federal criminal justice systems), the Court specifically addressed the issue of whether evidence pertaining to the discovery and condition of ten-year-old Pamela Powers' body should have been admitted — despite the officer's unlawful conduct — on the ground that it would ultimately or inevitably have been discovered by the 200-member search party even if no violation of any constitutional provisions had taken place. The answer was hardly surprising; the rationale bears inspection. In admitting the evidence, the Court explicitly endorsed the inevitable discovery doctrine by focusing, once again, on the high cost exclusion imposes on society whenever a criminal goes free "because the constable has blundered."<sup>232</sup> The *Nix* Court concluded that such costs are justified only where it can be shown the rule has some significant deterrent impact on future police misconduct. "[T]he prosecution is not to be put in a better position than it would have been in if no illegality had transpired."<sup>233</sup> But neither is it to be put in a worse position. In short, the prosecution should stand as if no illegality on the part of the government had ever occurred. Applied to the facts in *Nix*, the Court found by a preponderance of the evidence<sup>234</sup> that, even without the incriminating statements, the body eventually would have been found by the search party. Such evidence, therefore, ought to have been admitted.<sup>235</sup>

Nor must the prosecution show that the police acted in good faith. Such a requirement "would place courts in the position of withholding from juries relevant and undoubted truth that would have been available to police absent any unlawful police activity."<sup>236</sup> But this placing of the police in a worse position for

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230. 430 U.S. 387 (1977).

231. *Id.* at 399-400 n.6.

232. *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

233. *Nix*, 467 U.S. at 443.

234. *Id.* at 444.

235. *Id.* at 448-50.

236. *Id.* at 445.

the unlawful conduct is precisely the result prohibited in *Nix*. Moreover, noted the Court, an officer will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered and, therefore, could not use the existence of such an exception to govern his actions.<sup>237</sup> When coupled with the presence of other significant disincentives to obtaining evidence illegally — such as the possibility of departmental and civil liability — it becomes clear that the likelihood of the inevitable discovery exception promoting police misconduct is so minimal as to render problematic any possible benefits to deterrence that a good-faith requirement might produce. As with the independent source doctrine, the factual question here is simply whether the evidence would have been discovered absent the police misconduct. *Nix* makes it clear that if the answer is yes, then the deterrence rationale of the exclusionary rule has so little basis that the evidence should be received.

### c. *Good Faith Exception*

The newest of the three exceptions to the exclusionary rule, commonly referred to as the good faith exception, was first announced by the Supreme Court on July 5, 1984, in *United States v. Leon*<sup>238</sup> and *Massachusetts v. Sheppard*.<sup>239</sup> In *Leon*, the police conducted a search for drugs and other evidence pursuant to a facially valid warrant that an appellate court later found defective.<sup>240</sup> In *Sheppard*, the police relied upon what was later determined to be a technically deficient warrant — the affiant had used the wrong form — in conducting their search for murder evidence.<sup>241</sup> In both cases, the Supreme Court refused to exclude the results of the searches, holding that the fourth

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237. *Id.* Query, as did the *Nix* Court, whether it would matter that the officer does or does not foresee the inevitable discovery of the sought-for evidence. If he does not, then the expected result of his transgressions would be suppression of the evidence and he would consequently refrain from such actions; whereas, if he does foresee its inevitable discovery, then he would certainly refrain from engaging in any dubious shortcuts which might jeopardize the admissibility of his hard-earned evidence. In either case, the officer would have nothing to gain by acting unlawfully.

238. 468 U.S. 897 (1984).

239. 468 U.S. 981 (1984). Strictly speaking, *Leon* was the groundbreaker and *Sheppard* was *Leon*'s first application.

240. *Leon*, 468 U.S. at 902-04.

241. *Sheppard*, 468 U.S. at 984-87.

amendment's exclusionary rule should not be applied so as to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant, issued by a detached and neutral magistrate, that is ultimately found to be invalid.

The Court rested this potentially far-reaching decision on a multi-tiered analysis grounded on three bases. First, the Court opined, the purpose of the exclusionary rule is deterrence, and the object of the deterrence is the policeman, not the judge, because "there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion."<sup>242</sup> Second, the question as to whether a magistrate correctly determined the existence of probable cause is an issue for judges and lawyers. As such, it is far beyond the ken of an ordinary officer, who lacks the requisite legal training, to second-guess a magistrate's judgment. "[O]nce the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law."<sup>243</sup> To ignore this simple reality and penalize an officer who reasonably relies on a magistrate's error is to defy both logic and the deterrent purpose of the rule. Finally, the Court noted that the exclusionary rule cannot be expected, and should not be applied, to deter objectively reasonable law-enforcement activity, such as where an officer acting with objective good faith supplies the information upon which a search warrant issues and then acts within its scope. The Court's conclusion was concise: evidence obtained in reasonable reliance on a subsequently invalidated search warrant is admissible.

In so holding, the Court specifically limited the exception so that it will not apply in the following situations: where the police conduct is not objectively reasonable (such as where the magistrate is given information that the officer "knew was false or would have known was false except for his reckless disregard of the truth"<sup>244</sup>); where the magistrate had not been neutral and

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242. *Leon*, 468 U.S. at 916.

243. *Id.* at 921 (quoting *Stone v. Powell*, 428 U.S. 465, 498 (1976) (Burger, C.J. concurring)).

244. *Id.* at 923 (citing *Franks v. Delaware*, 438 U.S. 154 (1978)). "We emphasize that

detached;<sup>245</sup> or where there are blatant deficiencies in the warrant, to include a total lack of indicia of probable cause or a failure to particularize the place to be searched or the things to be seized.<sup>246</sup> Notwithstanding these limitations, Justice Brennan's fears, as expressed in his dissent in *Leon*,<sup>247</sup> that this doctrine will soon be applied to warrantless searches may have some merit. Indeed, much of the language in *Leon* suggests a broad good-faith rationale, with objective reliance on a deficient warrant emerging as simply one example of this newly born doctrine. For example, in stressing the inapplicability of the deterrence rationale when official conduct is pursued in complete good faith, the *Leon* Court noted that "[t]his is particularly true, we believe, when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope."<sup>248</sup> Given such language and the Court's ill-disguised disenchantment with the exclusionary rule, it is likely the Court will soon find other "particularly compelling example[s] of good faith" upon which to place its imprimatur.

With regard to the exclusionary rule, the conclusion of the Supreme Court's decisions of the last several years is that where officers have acted unlawfully in procuring evidence of crime and the exclusion of the evidence will well serve to prevent these and other officers from acting in a similar manner, the evidence will not be admitted. But where the exclusion of the evidence will work no deterrent effect (such as where the officers have acted in objective good faith) or the evidence would have been procured even absent the misconduct (such as where it was derived from a source independent of the illegal activity or would inevitably have been discovered), the sole purpose of the exclusionary rule would not be furthered and the evidence will be admitted.

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the standard of reasonableness we adopt is an objective one." *Id.* at 919 n.20.

245. *Id.* at 923 (citing *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979)).

246. *Id.* (citing *Brown v. Illinois*, 422 U.S. 590, 610-11 (1975) (Powell, J., concurring in part)).

247. *Id.* at 928-60 (Brennan, J., dissenting). This dissenting opinion applied to both *Leon* and *Sheppard*.

248. *Id.* at 920 (emphasis added).

### III. Conclusion

Few areas of jurisprudence cut as close to the bone as does the fourth amendment. Given the unprecedented level of activity in such a volatile area and the concomitant reordering of many of the values which underlie society's approach to the criminal justice system, the great and heated debate which arises every time the Supreme Court puts pen to paper is hardly surprising. Critics contend that the Burger Court has, in the last several years, forsaken its role as the protector of individual liberties and has become just another adjunct to the law-enforcement field, while advocates respond to the doomsayers by noting that the decisions of the Burger Court, exhibiting judicial restraint, are more in tune, and less at odds, with the Founding Fathers than ever was the aberrational Warren Court.

Stripped of all this dangerous rhetoric, what may be gleaned from the Supreme Court's last several terms is its decision that it is not always just to forego probative and competent evidence whenever the constable blunders. This Court has concluded — in what is in essence an altogether unremarkable proposition — that the issue of the admissibility of a particular piece of evidence must be resolved by recourse to a balancing process. On the one side is the protection of the sanctity of the home, the deterrence of police misconduct, and the consequent promotion of the integrity of the judicial process. On the other side, in direct and often conflicting juxtaposition, is the undesirability of withholding from juries relevant and undoubted truth, the high social cost of letting the obviously guilty go unpunished for their crimes, and the resultant denigration of the integrity and fairness of a criminal trial. Where these scales tip in favor of exclusion, there the evidence will not be admitted. Conversely, where the balance is in favor of admission, there the evidence will not be excluded. It may be concluded, therefore, when the din raised by these decisions settles and with little chance of contradiction by those who view the battle, not from the line of scrimmage or the stands, but from the cooling perspective of the pressbox, that all is well in fourth amendment land, that this knight of justice — endowed by its creators with unparalleled resilience — stands unblemished by the excesses of history. In short, those who have sought to recast its armor in their own image have left it untarnished and ready for the jousts to come.